IN THE

Supreme Court of the United States

October Term, 1977

No. 77-902

VOLKSWAGENWERK AKTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN PRODUCTS CORPORATION and VOLKSWAGEN SOUTH CENTRAL DISTRIBUTOR, INC.,

Petitioners,

v.

HEATRANSFER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Opinions Below

The opinion of the court of appeals (1a-46a) is reported at 553 F.2d 964. The relevant opinions of the district court (50a-86a) are not officially reported but appear at 1975-1 Trade Cas. ¶ 60, 306, 07 and 09.

Jurisdiction

The judgment of the court of appeals (47a) was entered on June 13, 1977. A timely petition for rehearing was denied on October 19, 1977 (48a, 49a). The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

Questions Presented

1. (a) Whether a standard "best efforts" clause, which promotes interbrand competition by requiring franchisees to stock and promote their franchisor's full product line, but does not restrict their freedom to purchase from other suppliers, nevertheless constitutes an illegal *per se* tying arrangement because its enforcement lessens the marketing opportunities of competing suppliers; and

(b) Whether the test of an illegal *per se* tying arrangement is different because the plaintiff is a competing supplier rather than a franchisee.

2. Whether the decision of certain manufacturers of automobile air conditioners to limit their production and sales to the automobiles of a single company (Volkswagen) made such air conditioners a relevant market unlawfully monopolized by such company, despite undisputed evidence of (a) production flexibility at the manufacturer level and (b) vigorous interbrand competition at the consumer level.

3. (a) Whether the acquisition and rehabilitation of a faltering captive supplier can violate Section 7 of the Clayton Act; and

(b) Whether a supplier's acquisition of a wholesale distributor violated Section 7 merely because the distributor bought proportionately more from the supplier after the acquisition than it had before.

4. In a Section 7 case where the plaintiff claims and the jury finds that but for the acquisition the acquired firm would have continued to decline until it disappeared as a viable competitor—

(a) Whether the "failing company" defense has been established by the plaintiff's own proof;

(b) Whether the defense requires proof that the acquired firm could not be reorganized in a bankruptcy proceeding; and

(c) Whether the plaintiff, consistently with *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), is entitled to damages based not on anticompetitive acts but on the rehabilitation of the acquired firm through lawful product and service improvements.

Statutes Involved

The relevant provisions of the Sherman and Clayton Acts appear in Appendix B.

Statement of Facts

This antitrust treble damage action arises out of Volkswagen's efforts to compete in the American automobile market by offering air-conditioned automobiles comparable in all respects to cars manufactured domestically.[1]

Volkswagen was the first imported automobile to penetrate the U. S. automobile market on a large scale.[2] It was

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[1] We use "Volkswagen" interchangeably to refer to the vehicle, to Volkswagen of America, Inc. (the wholly owned American subsidiary of the German corporation that manufactures Volkswagens), and to the manufacturer. During the period of this suit Volkswagen of America, Inc. imported Audi and Porsche as well as Volkswagen automobiles. Audis are manufactured by a subsidiary of Volkswagen, Porsches by an independent company (R. 3528-29). ("R." references are to the numbers appearing at the top of the pages in the printed Appendix filed below.)

[2] Its share of U.S. auto sales reached 6.8 percent in 1970 but had declined to 4.1 percent by 1973, the last year for which there is evidence in the record (8a). That year General Motors sold 44.4 percent of all new cars in the U.S., Ford 24 percent, and Chrysler 13.1 percent (DX 862).

also the first such car with parts and service availability provided through a nationwide franchise system (R. 754-55, 3512-13).[3] The Volkswagen distributor and dealer contracts require the franchisee to use his "best efforts to promote the sale of" both Volkswagen automobiles and "VW Parts," defined as any parts or accessories supplied by Volkswagen (20a, n. 11). The franchisee is free to buy from other suppliers but he is required to "maintain a reasonable inventory of the corresponding genuine and approved items and devote reasonable promotional efforts to them" (PX 22; DX 904; R. 3074-75, 3533-39, 3714-31).[4]

Most domestic automobiles are sold with air conditioning installed on the assembly line (R. 5950-54). To compete with such factory air conditioning, Volkswagen in 1963 started selling "hang-on" air conditioners (*i.e.*, for installation after the car has left the factory) which it bought from Delanair Engineering Co., a Texas subsidiary of an English firm, Delaney-Gallay (8a-10a). The Delanair air conditioner thereby became an approved "VW Part" covered by the best efforts clause in the Volkswagen franchise agreements. As air conditioning became increasingly important to the

[3] Originally Volkswagen sold to 14 independent wholesale distributors who resold to the dealer. Because the American manufacturers enjoy a cost advantage over Volkswagen by bypassing the distributor stage and selling directly to the dealer, Volkswagen has gradually been taking over the wholesale-distribution function (R. 3093, 3609-10, 3759-65). At the time of trial all but six of its distributors were regional offices of Volkswagen (7a-8a). One of the two acquisitions challenged in this case is Volkswagen's acquisition, on October 31, 1969, of Inter-Continental Motors Corp. (replaced by Volkswagen South Central Distributor, Inc.), a distributor located in San Antonio and serving five southwestern states (see pp. 8-9 *infra*).

[4] "Approval" is a term of art in the automobile field (R. 5952-53). A part or accessory is "approved" if it is sold by the automobile importer; it is not approved if it is not sold by him (R. 565-66, 1668).

sale of vehicles, a *de facto* partnership developed between Volkswagen and Delanair (R. 4004-06). Delanair personnel visited the Volkswagen and Audi factories and received advance technical information so that Delanair could adapt its air conditioners to the vehicles' design (R. 4009-11; 15a, n. 9). Volkswagen tested, promoted and sold the Delanair unit as its product, backed up with the Volkswagen warranty (R. 4004-09, 4698-703). By 1969 Delanair was selling 95 percent of its output to Volkswagen for resale to Volkswagen's customers (27a; PX 8).

Other producers of hang-on air conditioners for Volkswagens sold directly to the Volkswagen distributors and dealers. In 1968 one such firm, DPD, persuaded Volkswagen's distributor for the Gulf states to carry its units exclusively and another became the exclusive supplier to the Los Angeles distributor (12a, 13a-14a).

During that year, various problems developed with the Delanair unit. For example, a design problem—the location of the condenser on the underside of the automobile where it was vulnerable to road hazards—was exacerbated by poor quality control (10a, n.8; R. 4402-03). In July 1969, with Delanair sales plummeting, Delaney-Gallay decided to sell Delanair. It closed down its production line, after Volkswagen refused to buy the company (R. 4046-60, 4334-37).

Aggravated by rumors that it was going out of business, Delanair's condition deteriorated rapidly. By September, when only 26 air conditioners were sold, it was "just bust" (14a; R. 4065). Its losses were mounting at the rate of $125,000 a month; it had cash on hand to cover only one week's wages; its plant was closed down and most of its work force laid off; and its new president had resigned after two weeks on the job, viewing the situation as hopeless (R. 4087-90, 4106). Delanair also had a debt of $2 million,

half of which was to mature on October 1, and there was no way of meeting this deadline (PX 13, p. 2; R. 3561-62, 4117-19A).

Having tried but failed to find another purchaser, Delaney-Gallay in September 1969 returned in desperation to Volkswagen. Delaney-Gallay gave Volkswagen two alternatives: buy Delanair or see it liquidated by September 30 (R. 3570-80, 4121-23, 4126-28). To avoid liquidation, which would have left the tens of thousands of Volkswagen owners who had bought Delanair units as Volkswagen products without a manufacturer of repair parts, Volkswagen reluctantly agreed to buy Delanair (R. 3576-78, 4123).

Announcement of the acquisition, which became effective on September 26, 1969, was reassuring to those Volkswagen distributors and dealers who had stopped buying Delanair units because of rumors that it was going out of business (PX 155; R. 4277). Volkswagen personnel telephoned and visited its customers (the Volkwagen distributors)—two of whom had dropped the approved unit completely—to urge them to buy (23a; PXs 98, 100; R. 3076-77, 4595-4653). Sales rose, but for several months remained well below the level reached before Delanair's summer shut-down (*compare* PX 8, p. 52 with PX 7). Sales also rose for Volkswagen's competitors. Their sales increase in 1970, post-acquisition, matched Volkswagen's almost exactly (Table 1, *infra* p. 7).

Delanair was renamed Volkswagen Products Corporation ("VPC") and an experienced executive was installed as its head. Assisted by a large interest-free loan from Volkswagen (later repaid in full), he instituted a series of immediate steps to reverse Delanair's decline (R. 3586-89, 5491). He enlarged the scope of the warranty; instituted drastic quality-control measures (involving the reworking of thousands of units held in inventory and

the junking of a half million dollars' worth of parts deemed inadequate); and altered the brackets on the condenser so as to fasten it securely to the car (PX 11, pp. 11-12; PX 297; DX 92; R. 5370-71, 5484-87, 5664-66).

By the beginning of the 1971 model year, VPC's model line had been extended to cover the full range of Volkswagen models and also the condenser had been removed from its vulnerable position beneath the car—a change that plaintiff's vice-president described as a "terrific improvement" (PX 11, pp. 13-14; R. 430, 2092, 5542-45, 5550). To solve the problem of improper and time-consuming installation of air conditioners by inexperienced dealer personnel, Volkswagen distributors offered "port installation" of air conditioners, *i.e.*, installation at the port of entry by specialized mechanics employed by the distributor (PX 11, p. 7, PX 457; R. 4488-91).

Although VPC's sales rebounded strongly in 1971, it never regained the relative position Delanair enjoyed before 1969 (Table 1).

TABLE 1

SALES OF AIR-CONDITIONERS FOR VOLKSWAGEN, PORSCHE, AND AUDI VEHICLES

Manufacturer	1965	1966	1967	1968	1969*	1970	1971	1972	1973
Delanair/VPC	6,702	11,144	22,754	36,339	24,400	31,923	69,394	63,507	85,665
DPD	1,200	3,000	3,700	7,000	15,709	22,534	23,854	24,007	28,502
Meier-Line ...	0	0	317	988	4,134	2,116	343	421	0
Heatransfer ..	0	0	0	0	2,463	4,750	2,907	3,514	1,623
Total	7,902	14,144	26,771	44,327	46,708	61,323	96,498	91,449	115,790
Delanair/VPC % share of total	84.8	78.8	85.0	82.0	52.2	52.1	71.9	69.4	74.0

* Delanair was named VPC after its acquisition by Volkswagen on September 26, 1969.
Source: PX 618A.

During Delanair's decline, DPD's sales representative, W. H. Lende, Jr., decided to enter the automobile air conditioning business on his own (R. 234, 644). Doing business

as the plaintiff, Heatransfer Corporation, he designed an air conditioner for the Volkswagen "Beetle", to be installed behind the rear passenger seat and blow cold air forward. In early 1969 he offered this unit both to Volkswagen and to several Volkswagen distributors (R. 275-94; DX 911). A number of other manufacturers, including A-R-A, Frigiking, Coolaire, DPD, and Meier-Line, were also pressing Volkswagen to buy their units. But, in July 1969, when no acquisition was in prospect, Volkswagen reconfirmed its policy of buying Delanair products exclusively (PX 638; R. 3550-56, 4448-53).

One of the Volkswagen distributors, Inter-Continental Motors Corp. began to buy the Heatransfer unit in June 1969 (13a). Five months later, on October 31, 1969, this distributor was acquired by Volkswagen (*see*, *supra* p. 4, n. 3). It continued to stock and sell the Heatransfer unit along with the VPC and DPD products (PX 594; DX 302). But while during June-October 1969 the distributor bought proportionately more from Heatransfer than from Volkswagen, by the end of 1970 the percentages were reversed (14a).

A second Volkswagen distributor took on Heatransfer in January 1970 (DX 654). Three months later, Lende decided to stop his selling efforts with the Volkswagen distributors and distribute his product instead through a mass merchandiser, such as Sears, Roebuck (R. 407-20).

After the failure of this strategy and of its efforts to develop profitable export sales, Heatransfer brought this suit in 1972, charging violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, based on the Delanair and Inter-Continental acquisitions and the Volks-

wagen distributor and dealer best efforts clauses.[5] It sought damages predicated on the assumption that Delanair, but for its acquisition by Volkswagen, would have disappeared from the market and Heatransfer would have picked up a large part of its sales.

At the conclusion of the eight-week trial, the case was submitted to the jury upon a special verdict with fifteen interrogatories (2a-5a, n. 1). After one hour's deliberation, the jury found, among other things, that the "provisions of the Volkswagen dealer and distributor franchise agreements constitute tying arrangements under Section 1 of the Sherman Act"; that each of the defendants had conspired or attempted to monopolize, or monopolized, a worldwide market consisting of air conditioners for Volkswagen, Porsche and Audi automobiles, in violation of Section 2 of the Sherman Act; that Delanair was not a failing company and that Volkswagen's acquisitions of Delanair and of Inter-Continental Motors violated Section 7 of the Clayton Act in the Volkswagen-Porsche-Audi air conditioner market; and that Heatransfer had sustained injury caused by one or more of these violations in the amount of $5 million. This damage award was upheld on the ground that "[t]here is sufficient evidence in the record to sustain

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[5] The acquisitions have never been challenged by the Department of Justice or the Federal Trade Commission. And a Volkswagen best efforts clause substantially identical to that in suit here was approved by the Department. In 1957 the Department brought a civil action against Volkswagen and several of its distributors alleging, *inter alia*, improper restrictions on the distribution of Volkswagen automobiles and parts. The case was settled in 1962 by the entry of a consent judgment. Volkswagen agreed to notify each distributor and dealer that it was free to carry the goods of other suppliers so long as it complied with the requirements of the franchise agreement. *United States* v. *Volkswagen of America, Inc.*, 1962 Trade Cas. ¶ 70,256 (D.N.J.). The franchise agreement required the franchisee to "arrange for the efficient promotion of" Volkswagen automobiles *and parts* (including accessories). Transcript of Argument on Motions, Feb. 18, 1959, at p. 38, *United States* v. *Volkswagen of America, Inc.*, 182 F.Supp. 405 (D.N.J. 1960).

the jury's assumption that Delanair would have continued to decline until it disappeared as a viable competitor." (76a).

Damages were trebled pursuant to Section 4 of the Clayton Act and a stipulated attorney's fee added. The result was a judgment of $15,350,000 which was affirmed by the Court of Appeals for the Fifth Circuit.

Reasons for Granting the Writ

This case presents issues of large importance generated by the increasing use—and potential for abuse—of the antitrust treble-damage action. In order to sustain the $15 million judgment against petitioners, the court below stretched the *per se* rule against tie-ins to condemn a wholly legitimate provision found in most franchise agreements; adopted standards for establishing competitive injury which render most vertical mergers unlawful; eviscerated the failing company defense; inferred monopoly power solely from the large percentage of Volkswagen air conditioners that Volkswagen sold its distributors and dealers; and allowed damages unrelated to any antitrust violation by deeming the rehabilitation of an acquired firm an "antitrust injury." These rulings conflict with decisions of this Court and other circuits and with basic antitrust principles.

Review is necessary not only to clarify important and recurrent issues in private antitrust litigation but to preserve competition in a basic industry. As the Department of Justice observed in a related case, "Since the [American automobile] market is presently dominated by the three major American automobile manufacturers, the preservation of effective competition from foreign challengers is particularly important in maintaining a competitive economy."[6] The "effective competition" offered by Volkswagen is thwarted by the decision below. That decision puts Volkswagen under the competitive constraints that the antitrust laws impose upon a monopolist. It also penalizes Volkswagen's efforts to provide air-conditioned automobiles comparable in all respects to the factory air-conditioned products of its domestic competitors—whose earlier and more complete vertical integration has immunized them from this type of suit.[7]

[6] Brief for the United States as Amicus Curiae at 20, *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

The "Best Efforts" Tie-in Issues

1. A "best efforts" clause in a franchise agreement requires the franchisee to stock and promote his franchisor's full product line but puts him under no restraint in purchasing from other suppliers as well. The court below held that such a clause is an illegal *per se* tying agreement where its enforcement results in limiting the market available to a competing supplier (22a-23a).

The court's holding strikes at the heart of the American franchise system. While precise statistics are unavailable, it appears that almost all product franchise agreements contain a best efforts clause or its equivalent.[8] The decision below outlaws such clauses where—as is the usual case—the franchisor sells more than one product.

[7] Volkswagen's domestic competitors no longer sell to wholesale distributors and they install on the automobile assembly line air conditioners which they manufacture themselves (R. 6103-06). Hence, they cannot be charged, as Volkswagen was, with unlawfully tying air conditioners to automobiles by urging their automobile customers to buy their air conditioners, with having recently acquired a manufacturer of air conditioners, or with acquiring or conspiring with their distributors.

[8] See R. 5400-01; 1A Rabkin & Johnson, Current Legal Forms (1977) §§ 3.50, 3.52 ("push vigorously"), 3.57 ("vigorously promote"); 4 Am. Jur. Legal Forms 2d § 50:15 (1971); Glickman, Franchising § 10.03 (6)(1977); *Victory Motors of Savannah, Inc.* v. *Chrysler Motors Corp.*, 357 F.2d 429, 430 (5th Cir. 1966); *Milos* v. *Ford Motor Co.*, 317 F.2d 712 (3d Cir. 1963); *Beach Rambler, Inc.* v. *American Motors Corp.*, 1969 Trade Cas. ¶ 72,798 (S.D.N.Y.).

To be sure, the court stated that best efforts clauses are lawful "in isolation" (20a). But the statement is meaningless in light of the court's holding that they are *per se* illegal tying arrangements if the franchisor urges his franchisees to carry his full product line in accordance with the terms of the best efforts clause and a competing seller thereby loses anticipated sales (20a, 22a-23a).[9]

This Court and numerous federal circuit and district courts have held, to the contrary, that best efforts clauses and equivalent full-line promotional requirements are not illegal *per se* tying arrangements.[10] The *per se*

[9] There is no evidence, nor did the court below find, that Volkswagen enforced observance of the best efforts clauses through terminations, lawsuits, or other actual or threatened sanctions for noncompliance. In the precise language of the court below, the Volkswagen distributors and dealers "were urged to stock the Delanair/VPC air conditioner" by Volkswagen (23a).

[10] See *Pick Manufacturing Co.* v. *General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936), and cited approvingly in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 607 (1953); *Colorado Pump & Supply Co.* v. *Febco, Inc.*, 472 F.2d 637, 641 (10th Cir. 1973), *cert. denied*, 411 U.S. 987 (1973); *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974); *Timken Roller Bearing Co.* v. *FTC*, 299 F.2d 839 (6th Cir. 1962); *Miller Motors, Inc.* v. *Ford Motor Co.*, 149 F. Supp. 790 (M.D.N.C. 1957), *aff'd*, 252 F.2d 441 (4th Cir. 1958); *Refrigeration Engineering Corp.* v. *Frick Co.*, 370 F. Supp. 702 (W.D. Tex. 1974); *United States* v. *J. I. Case Co.*, 101 F. Supp. 856, 867 (D. Minn. 1951). Cf. *Reed Bros., Inc.* v. *Monsanto Co.*, 525 F.2d 486 (8th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976); *Stokes Equipment Co.* v. *Otis Elevator Co.*, 340 F. Supp. 937 (E.D. Pa. 1972); *McElhenney Co.* v. *Western Auto Supply Co.*, 167 F. Supp. 949 (W.D.S.C. 1958), *aff'd*, 269 F.2d 332 (4th Cir. 1959); *South End Oil Co.* v. *Texaco, Inc.*, 237 F. Supp. 650, 654 (N.D. Ill. 1965).

Best efforts or equivalent provisions have the approval of the Department of Justice. They have been routinely allowed in government antitrust consent decrees forbidding unlawful franchise restrictions. See *United States* v. *Becton, Dickinson & Co.*, 1964 Trade Cas. ¶ 71,144 at p. 79,512 (D.N.J.); *United States* v. *Bostich, Inc.*, 1958

category is reserved for practices "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5 (1958), quoted in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 97 S.Ct. 2549, 2558 (1977). Whereas tie-ins "serve hardly any purpose beyond the suppression of competition" (*Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 305 (1949)), best efforts clauses serve the pro-competitive business purpose of enabling the seller to get his line promoted aggressively. By fostering aggressive competition between manufacturers at the retail (franchisee) level, they promote interbrand competition—"the primary concern of antitrust law" (*GTE Sylvania, supra*, 97 S. Ct. at 2559 n. 19).[11]

2. The court below expanded the *per se* tie-in rule not only by sweeping best efforts clauses under it, with potentially enormous retroactive impact, but also by changing the standard of legality where the plaintiff is a competing supplier rather than a customer. For a customer, the court

Trade Cas. ¶ 69,207 at pp. 75,741-42 (D.R.I.); *United States* v. *Rudolf Wurlitzer Co.*, 1958 Trade Cas. ¶ 69,011 at p. 74,008 (W.D.N.Y.); *United States* v. *J. P. Seeburg Corp.*, 1957 Trade Cas. ¶ 68,613 at p. 72,479 (N.D. Ill.); *United States* v. *Philco Corp.*, 1956 Trade Cas. ¶ 68,409 at p. 71,753 (E.D. Pa.); *United States* v. *Bendix Aviation Corp.*, 1953 Trade Cas. ¶ 67,583 at p. 68,774 (S.D.N.Y.). See also n. 5 *supra* p. 9.

[11] Moreover, such clauses, though superficially restrictive of dealer freedom, in fact help preserve the independent small businessman. "To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of the independent businessman." *GTE Sylvania, supra*, at 2561 n. 26.

below recognized that the standard is coercion. However, for a supplier, it declared the standard to be mere foreclosure (22a). The far-reaching consequences of this novel doctrine are not limited to best efforts clauses. Any franchise covering more than one product is now vulnerable to attack as an illegal tying arrangement by a competitor for the same business. It is manifestly improper, as well as unprecedented, to make the legality of the same conduct differ depending on who brings the suit challenging it.

This Court should grant certiorari to keep the *per se* tie-in rule within proper bounds, consistently with its recent admonition that departures from the Rule of Reason must be based on "demonstrable economic effect."[12]

Monopolization

To prove monopolization under Section 2 of the Sherman Act, a plaintiff must prove a relevant market and then show that the defendant had monopoly power in it. In the present case, monopoly power was inferred solely from Volkswagen's percentage share of the narrow, erroneously defined "relevant market" constructed by plaintiff for purposes of this lawsuit (25a-29a).

Relevant Market. Although Volkswagen sells only about one percent of the automobile air conditioners sold in this country (DX 926), the court below imputed to it a huge market share by upholding a relevant market limited to air conditioners for the three makes of automobile that it imports (3a, n. 1, 27a). The court's sole ground for doing so

[12] *GTE Sylvania, supra,* 97 S.Ct. at 2562. Since "a *per se* violation is *ipso facto* an unreasonable restraint of trade" the court below held that its analysis of the best efforts clause justified the jury's finding of a conspiracy to restrain trade unreasonably in violation of Section 1 of the Sherman Act (24a). We do not discuss this Section 1 ruling separately, since it is derivative of the court's *per se* ruling.

was that the principal manufacturers of air conditioners for these makes "produced air-conditioning units almost exclusively for VWoA import cars." (26a). The court gave no weight to the undisputed fact that any firm which makes air conditioners for one make of automobile can use the same plant, personnel, and equipment to produce air conditioners for a different make of automobile and that Delanair and all of its competitors did so (PX 390; DX 940; R. 509-10, 1418, 1661-64, 1771, 3266-68, 4003-04). All that is involved in such a change is rearranging the same standard set of components.[13]

By ignoring production interchangeability, the court below divorced market definition from economic reality and created a conflict with the Ninth and Tenth Circuits. In *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975), and *ITT Corp.* v. *GTE Corp.*, 518 F.2d 913 (9th Cir. 1975), the Ninth Circuit held that where a high degree of production interchangeability exists, the relevant market must be expanded to include all of the interchangeable products. The Tenth Circuit reached the same conclusion in *Telex Corp.* v. *International Business Mach. Corp.*, 510 F.2d 894, 917-19 (10th Cir. 1975), *cert. dismissed,* 423 U.S. 802 (1975). Telex, a producer of peripheral equipment for computers, had chosen to limit its production to equipment plugged into IBM computers, in

[13] The "manufacture" of automobile air conditioners is a simple process of assembling standard components obtained from manufacturers of refrigeration equipment (R. 634, 1114-30). As plaintiff acknowledges, producers of automobile air conditioners "have no production facilities in the classic sense but rely on the production facilities of larger component manufacturers." Plaintiff's Response to Defendant's Motion for Directed Verdict at 22. Producing a unit for a new or different automobile make or model does not require any retooling, employee retraining or additions to productive capacity, but simply the purchase and packaging of a different mix of standard shelf items sold by manufacturers of refrigeration equipment (R. 1770-71, 5943-45).

the same way that Heatransfer limited its production to air conditioners installed in automobiles imported by Volkswagen. Telex argued that the relevant product market should accordingly be limited to peripheral equipment for IBM computers. The Tenth Circuit rejected this view on the ground that Telex could have designed its peripheral equipment to be compatible with another manufacturer's computers if it had wanted to do so. Its business decision to limit production to equipment for one manufacturer's brand did not delimit a relevant market for antitrust purposes. No more did the decision of a few manufacturers to produce air conditioners only for automobiles imported by Volkswagen create a relevant market.

These cases, and this Court's decision in *Columbia Steel* from which they descend,[14] demolish the "relevant market" upheld below.[15]

Monopoly Power. It was also error for the court of appeals to hold that possession of a large share of so narrowly defined a market proved the existence of monopoly

[14] In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 510-11 (1948), this Court stated: "Another difficulty is that the record furnishes little indication as to the propriety of considering plates and shapes as a market distinct from other rolled steel products. If rolled steel producers can make other products as easily as plates and shapes, then the effect of the removal of Consolidated's demand for plates and shapes must be measured not against the market for plates and shapes alone, but for comparable rolled products. The record suggests, but does not conclusively indicate, that rolled steel producers can make other products interchangeably with shapes and plates, and that therefore we should not measure the potential injury to competition by considering the total demand for shapes and plates alone, but rather compare Consolidated's demand for rolled steel products with the demand for all comparable rolled steel products in the Consolidated marketing area."

[15] The court below brushed these cases aside, remarking only: "These cases deal with the adaptability or substitutability of products, and contain nothing that persuades us to overturn" the jury's verdict (27a).

power (28a-29a).[16] The court ignored this Court's decisions which hold that an inference of market power based purely on statistics must yield to evidence that they exaggerate the defendant's actual power. *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 120 (1975); *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 613 (1974); *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 497-98 (1974).[17]

The critical fact here—which is not disputed by plaintiff—is that Volkswagen, Porsche and Audi automobiles are in vigorous competition with other brands of automobiles, foreign and domestic, and that this interbrand competition drastically limits Volkswagen's theoretical monopoly power deriving from its large share in the artificially narrow Volkswagen-Porsche-Audi air conditioning market.[18] The most important competition is not that which occurs within a single franchise system; it is the competition between franchise systems—between, say, air-conditioned Volks-

[16] That "market share" is not even of all Volkswagen automobiles sold. It is of *air-conditioned* Volkswagen automobiles. Only a small fraction (about 16 percent) of new Volkswagen automobiles are sold with air conditioning, as contrasted with the 74 percent share of domestic vehicles sold with factory air conditioning (PX 9, pp. 2, 9). Thus, Volkswagen's 76 percent share even of the relevant market found by the court below (28a) should be reduced to about 12 percent.

[17] Although these are merger cases, their holdings are applicable *a fortiori* to monopolization cases, where the requirements of demonstrating anticompetitive effect are more stringent.

[18] Heatransfer concedes that, given the competition faced by Volkswagen in the automobile market, it is speculative whether VPC's prices ever exceeded competitive levels. Its main brief in the court of appeals states (p. 155): "There was no way of knowing the extent to which VPC prices were higher than prices would have been in a competitive market. While there was evidence that VPC prices were not, as a practical matter, sensitive to requests for reduction based on competition from other kinds of cars, *there was also evidence that concern for lost car sales would at some point have a bearing on how high VPC prices became.*" (Emphasis added.)

wagens and air-conditioned Toyotas. (DX 573; R. 805-07). As this Court noted in *Continental T.V., Inc.* v. *GTE Sylvania Inc., supra,* 97 S. Ct. 2549, 2559 n. 19, "when interbrand competition exists . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." Thus, the "power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly." *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 393 (1956).

The court of appeals' refusal to consider the effect of interbrand competition on Volkswagen's market power led it to classify a pro-competitive foreign entrant into the U.S. automobile market as a monopolist to be placed under tight constraints in competing with the American manufacturers. This Court should grant certiorari in order to ensure that the concepts of relevant market and monopoly power under Section 2 of the Sherman Act are harmonized with the "primary concern of antitrust law": the preservation of "[i]nterbrand competition." *GTE Sylvania Inc., supra,* 97 S.Ct. at 2559 n. 19.

The Competitive Effects of the Acquisitions

In holding that Volkswagen's acquisition of its enfeebled captive air conditioner supplier, Delanair, and of its southwestern distributor, Inter-Continental Motors, had the effects on competition proscribed by Section 7 of the Clayton Act, the court below disregarded basic principles of merger law and this Court's controlling decisions.[19]

[19] An independent reason for reversal of the Section 7 findings is that they are expressly predicated on the same erroneous relevant product market determination that, as we have shown above, vitiates the court's monopolization finding.

The Delanair Acquisition. The court below relied on just two facts in holding that the Delanair acquisition was anticompetitive (31a).

The first was that the acquired company's sales and market share rose after the acquisition. They rose because at the time of the merger Delanair was in a state of collapse (with total sales of only 26 air conditioners the month before the acquisition) and Volkswagen rehabilitated it. Had Delanair been a healthy firm when acquired, the post-acquisition growth would have been less.[20] In that case, under the court's approach, the merger would have been invulnerable to Section 7 challenge.

In deeming rehabilitation of an acquired firm anticompetitive, the court below stood *United States* v. *General Dynamics Corp.,* 415 U.S. 486 (1974), on its head. That decision holds that when an acquired firm is "unable to compete effectively" (whether or not it is technically failing) the competitive significance of the acquisition must be discounted—not magnified. 415 U.S. at 508. *See also United States* v. *International Harvester Co.,* 1977-2 Trade Cas. ¶ 61,711 (7th Cir.).[21] Delanair's inability to compete is undisputed. Heatransfer's proof of damages assumed that Delanair was "beaten" and in an irreversible decline, and Lende testified that Delanair would have been completely

[20] In fact, VPC's market share never attained the level Delanair had enjoyed before it began to fail (see Table 1, *supra* p. 7).

[21] *International Harvester,* which follows *General Dynamics,* brings the Seventh Circuit squarely into conflict with the decision in this case. In that case, the defendants, eschewing the "failing company" defense and invoking, instead, what the Seventh Circuit denominated the *"General Dynamics* defense," introduced evidence to show that the acquired company's "weak financial reserves (like United Electric's weak coal reserves in *General Dynamics*) would not allow it to be as strong a competitor as the bald statistical projections indicate." ¶ 61,711 at p. 72,900. The Seventh Circuit held that this evidence of the acquired company's "weakness as a competitor" rebutted the Government's *prima facie* case based on statistics. *Ibid.*

eliminated from the market by 1973 (39a; R. 649; p. 22 *infra*). Merger with such an enfeebled competitive factor could have no adverse effect on competitors of the merging firms. Its rehabilitation and preservation in the marketplace could only strengthen competition.

The second ground for holding the Delanair acquisition unlawful was that by acquiring Delanair, Volkswagen "had severely limited the chance of Volkswagen approval [*i.e.*, purchase] of any other unit, thus curtailing the marketability of those other units." (31a) The vice of an unlawful vertical merger, however, is the "foreclosure of a share of the market *otherwise open to competitors.*" *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 328 (1962) (emphasis added). Even assuming that denial of approved status could be equated to antitrust "foreclosure," [22] Volkswagen was not a market "otherwise open to competitors." It was "foreclosed" to competitors of Delanair long before the merger took place by virtue of its *de facto* partnership with Delanair (*supra* pp. 4-5). As a result of this relationship, the legality of which is not questioned, Volkswagen never purchased or approved air conditioners other than Delanair's. Even at the height of Delanair's troubles in the summer of 1969, Volkswagen rejected all other units (including Heatransfer's) and announced it would stay with the Delanair unit (*supra* p. 8). The only change brought

[22] We submit that it cannot be. Purchase by Volkswagen for resale to its distributors might confer a marketing advantage on a supplier, but a competing supplier's lack of such an advantage is unlike the foreclosure that results when an essential link in the distribution chain is acquired by one supplier to the exclusion of all others. In *Brown Shoe*, *supra*, a major shoe manufacturer acquired the leading independent retail shoe chain and thereby foreclosed competing manufacturers from access to the ultimate consumer unless they opened their own retail shoe stores. Here, competitors like DPD could and did reach the ultimate consumer through sale directly to Volkswagen distributors and dealers. Since only about 16 percent of Volkswagen vehicles are sold with air conditioning, the potential for such sales is clear. *Supra* p. 17, n.16.

about by the acquisition was the conversion of Delanair from a captive supplier to a formal subsidiary of Volkswagen.

Consequently, this case is controlled by *United States* v. *Citizens & Southern National Bank*, *supra*, 422 U.S. 86 (1975). There this Court rejected the argument that the acquisition by a bank of its *de facto* (but formally independent) branches violated Section 7 merely because it made permanent an informal relationship that, but for the acquisition, might have dissolved. No more did Volkswagen's acquisition of its *de facto* partner affect competitive realties.

The Inter-Continental Acquisition. The court's only basis for ruling that Volkswagen's acquisition of Inter-Continental Motors violated Section 7 was that this distributor bought proportionately more air conditioners from Volkswagen after the acquisition than it had done before (31a). But in every vertical merger case it is assumed that the merger will result in increased trading between the formerly independent partners; heretofore that has been the starting point, not the end, of analysis. By holding that illegality was established simply by proof that the acquired firm bought proportionately more from the acquiring firm following the merger than before, the court below has condemned virtually all vertical mergers.

Failing Company

Review in this case is also necessary to resolve important questions regarding the failing-company defense under Section 7 of the Clayton Act.

1. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), left open the question whether a plaintiff who bases his damage theory on the premise, and supporting proof, that the acquired firm was failing has thereby proved (against himself) the failing company defense. 429

U.S. at 484 n. 9. *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1132-33 (1976), cited at 429 U.S. at 487 n. 11.

The premise of the damage theory on which the jury based its $5 million damage award (plaintiff's "Method II") was that but for its acquisition by Volkswagen, Delanair would have lost sales at a rate of 31 percent a year until it disappeared from the market (R. 2179-81).[23] The explicit basis on which the trial court upheld the damage award was that "[t]here is sufficient evidence in the record to sustain the jury's assumption that Delanair would have continued to decline until it disappeared as a viable competitor." (76a).[24] No more is required to demonstrate that Delanair faced "the grave probability of a business failure." *International Shoe Co.* v. *FTC*, 280 U.S. 291, 303 (1930). The precise date of final demise—whether 1973 as Lende testified or earlier or later—is irrelevant.

It is no answer here that the failing company defense also required a search for alternative purchasers (39a). Heatransfer's damage theory, by assuming that Delanair, had it not been acquired by Volkswagen, would have continued to decline irreversibly to an inevitable demise, neces-

[23] Heatransfer's expert witness on damages testified as follows (R. 2429-30):

"Q. And, further, in summary, you have assumed under Method Two that Delanair declined at 31 percent in total unit sales?

"A. Correct.

* * *

"Q. This decline continues until Delanair, in effect ceases to exist, in the future?

"A. Correct.

"Q. You assume that?

"A. Correct.

"Q. And you assume that there was no reversing of the process at any point in time under Method Two?

"A. That is correct."

[24] The jury was charged that to find the damages claimed by Heatransfer it first had to find that "but for the acquisition by VWoA, Delanair's sales would have declined at a constant rate of 31 percent per year." (R. 6509).

sarily also assumed that the search for an alternative purchaser would have failed.

2. Moreover, the jury was erroneously instructed that to establish the failing company defense Volkswagen had to prove "that the prospects of saving the company [Delanair] through reorganization in bankruptcy were dim or non-existent" (R. 6503). This requirement was rejected in *International Shoe Co.* v. *FTC, supra*, 280 U.S. at 301-02, on the ground that the purpose of the failing company defense is to protect creditors and shareholders, who frequently fare badly in bankruptcy proceedings. To deny the failing company defense to firms reorganizable in bankruptcy would deny its benefits to the very groups it was designed to aid.[25] Furthermore, Heatransfer, in alleging for damage purposes that Delanair was in an irreversible decline, negated the possibility of salvage through reorganization in bankruptcy.

Antitrust Injury Under Brunswick

In upholding damages based on the fact that Volkswagen's acquisition preserved Delanair as a competitor of plaintiff, the court below failed to follow *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra*, 429 U.S. 477 (1977).[26] The defendant in that case had acquired a number of bowl-

[25] The instruction derives from *United States Steel Corp.* v. *FTC*, 426 F.2d 592, 608-09 (6th Cir. 1970), adopting a dictum in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 138 (1969). Decisions of this Court postdating *Steel* have made clear that the *Citizen* dictum was unintentional. *United States* v. *Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971); *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 507 (1974). Accordingly, *United States* v. *M.P.M., Inc.*, 397 F.Supp. 78 (D. Colo. 1975) declined to follow *Steel*. *Accord, United States* v. *Black & Decker Mfg. Co.*, 430 F.Supp. 729, 778 (D. Md. 1976); *United States* v. *American Technical Industries*, 1974-1 Trade Cas. ¶ 74,873 (M.D. Pa.).

[26] Heatransfer made no attempt to relate its damages to the antitrust injuries claimed. Instead, it based damages on the sales

ing centers. The damage theory of the plaintiffs (competing bowling centers) was that but for the acquisitions the acquired centers—which were in perilous financial straits—would have gone out of business, enabling the plaintiffs to pick up some of their customers. This Court rejected that theory, holding that Section 4 of the Clayton Act requires that a plaintiff's damage theory be consistent with its theory of liability. Having alleged that the Brunswick acquisitions were unlawful under a "deep pocket" theory, plaintiffs could not recover on the basis of Brunswick's rehabilitation of the acquired bowling centers which was unrelated to any abuse of its deep pocket.

Although the Delanair acquisition was deemed anticompetitive because it "severely limited the chance of Volkswagen's approval of any other units" (31a), Heatransfer made no effort to show its damages, if any, from loss of "the chance of Volkswagen's approval." It did not demonstrate what its sales would have been had the Heatransfer unit been bought and resold by Volkswagen. Instead, it proceeded on the same "but for" approach as the *Brunswick* plaintiffs. It argued that but for the acquisition by Volkswagen, Delanair would have proceeded on a steady downward decline, and it claimed and was awarded damages with respect to *all* of the sales it allegedly lost because Delanair's decline was arrested and reversed by the acquisition. Heatransfer's damages thus included sales it lost solely because, after the acquisition, the Delanair condenser was removed from its vulnerable position beneath the chassis, Delanair's warranty was enlarged and its product line

it would have gained as Delanair declined. Heatransfer's damage theory assumed that the difference between the sales actually made by VPC following the acquisition and those which a declining Delanair would have enjoyed represented sales improperly taken from Delanair's competitors. Of these, Heatransfer claimed it would have made 30 percent together with 30 percent of all sales of units for Volkswagen, Porsche and Audi vehicles actually made by DPD, Meier-Line and itself (PXs 621, 623, 626; R. 2175-86).

broadened and other product and service improvements were made (*supra* pp. 6-7). Yet none of these were "anticompetitive acts made possible by the violation." In allowing the recovery of damages for these lawful acts taken to rehabilitate a failing competitor, the decision below clearly departs from *Brunswick* (33a-38a).

The court of appeals attempted to distinguish *Brunswick* on the ground that Volkswagen did more than just rehabilitate Delanair (38a). But Heatransfer's theory of damages was not based on whatever more the court believed Volkswagen to have done. Even assuming that Heatransfer might have devised such a theory, this would not distinguish *Brunswick*. The same possibility existed there. This Court explicitly held that the fact that the plaintiffs might have but did not "attempt to prove that they had lost [some] income as a result of [Brunswick's alleged] predation" could not save a damage theory unrelated to that predation. 429 U.S. at 490.

Conclusion

In upholding a $15 million judgment against a foreign competitor of the American automobile manufacturers, the court below established expansive and erroneous rules of liability and damages applicable to all private antitrust damage actions. These rules, which are in conflict with holdings in this Court and in other circuits, will control the outcome of antitrust litigation throughout the Fifth Circuit, where nearly twenty percent of private antitrust cases originate.[27] Unless this Court grants certiorari and reverses, the threat of potentially enormous treble-damage judgments will lie heavy on the $200 billion franchise in-

[27] Computed from Annual Report, Administrative Office of the United States Courts (1974), pp. 397-99; Annual Report, Administrative Office of the United States Courts (1975), pp. 354-55; Annual Report, Administrative Office of the United States Courts (1976), pp. 300-01.

dustry, and will discourage the acquisition and rehabilitation of failing or faltering firms.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 23, 1977.

Appendices

Appendix A

Opinion

United States Court of Appeals

Fifth Circuit

No. 75-2779

June 13, 1977

HEATRANSFER CORPORATION,
Plaintiff-Appellee,

v.

VOLKSWAGENWERK, A. G., *et al.*,
Defendants-Appellants.

• • •

Appeal from the United States District Court for the Southern District of Texas.

Before:

GOLDBERG, SIMPSON and FAY, *Circuit Judges.*

SIMPSON, *Circuit Judge*:

I. PRELIMINARY STATEMENT

This appeal has generated a record of giant proportions. We are presented with 37 volumes of transcript, nine appendix volumes of abbreviated transcript, six briefs totalling 409 pages (with 83 pages of appendices), over 1600

exhibits, and considerable correspondence to this Court from the parties. We have done our best to pare down the issues and arguments presented on appeal, and the discussion and disposition of those issues and arguments, to the greatest extent possible consistent with reasoned resolution of the controlling questions presented. The result is an opinion still regrettably overlong.

II. NATURE AND DISPOSITION OF THE CASE

Plaintiff-appellee Heatransfer Corporation filed a private antitrust suit, pursuant to Section 4 of the Clayton Act, 15 U.S. Code, Section 15, against defendants-appellants Volkswagenwerk Aktiengesellschaft (VWAG); its wholly-owned subsidiary, Volkswagen of America, Inc. (VWoA); and two wholly-owned subsidiaries of VWoA, Volkswagen South Central Distributor, Inc. (VWSC) and Volkswagen Products Corporation (VPC). Heatransfer's complaint alleged multiple violations of Sections 1 and 2 of the Sherman Act, 15 U.S.Code, Sections 1-2, and Section 7 of the Clayton Act, 15 U.S.Code, Section 18.

The case was tried before a six-person jury, and was submitted for special verdict under Rule 49(a), Federal Rules of Civil Procedure, with 15 written Questions to be answered by the jury.[1]

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[1] The Questions were as follows:

Questions as to Section 1 of the Sherman Act.

Question 1. Do you find from a preponderance of the evidence that the provisions of the Volkswagen dealer and distributor franchise agreements constitute tying arrangements under Section 1 of the Sherman Act? Burden of proof is on plaintiff.

Answer yes or no.

The jury's findings, in response to the written questions submitted may be summarized as follows:

(1) The provisions of the Volkswagen dealer and distributor franchise agreements constitute tying agreements, in violation of Section 1 of the Sherman Act.

If you answered the above question "No", do not answer question 2 and do not consider defendants' conduct with respect to the franchise agreements in violated Section 1. If you have answered question 1 "Yes", then proceed to answer question 2.

Question 2. Do you find from a preponderance of the evidence that the tying arrangement contained within the dealer and distributor franchise agreements was necessary in order to preserve the goodwill of the defendants? Burden of proof is on defendants.

Answer yes or no.

If you have answered question 2 "Yes", do not consider the defendants' conduct with respect to the franchise agreements in determining if the defendants have otherwise violated Section 1 of the Sherman Act. If you have answered question 2 "No", you may consider the defendants' conduct in determining whether such a violation has occurred. In any event, you will proceed to answer question 3.

Question 3. Do you find from a preponderance of the evidence that Volkswagen Products Corporation (VPC) was a part of a conspiracy, combination or agreement to restrain trade unreasonably in violation of Section 1 of the Sherman Act? Burden of proof is on plaintiff.

Answer yes or no.

Question 4. Do you find from a preponderance of the evidence that Volkswagen of America (VWOA) or Volkswagen South Central was a part of a conspiracy, combination or agreement to restrain trade unreasonably in violation of Section 1 of the Sherman Act? Burden of proof is on plaintiff.

Answer yes or no.

Question 5. Do you find from a preponderance of the evidence that Volkswagen Germany (VWAG) was a part of a conspiracy, combination or agreement to restrain trade unreasonably in violation of Section 1 of the Sherman Act?

Answer yes or no.

Questions as to Section 2 of the Sherman Act.

Question 6. Do you find from a preponderance of the evidence that the relevant market in considering Section 2 of the Sherman Act was the manufacture and sale of air conditioners for only Volkswagen, Porsche and Audi automobiles throughout the world, rather than

(2) VWAG, VWoA (or VWSC), and VPC each (a) engaged in a conspiracy, combination, or agreement to re-

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either the manufacture and sale of air conditioners for all automobiles or for all compact automobiles in the United States? Burden of proof is on plaintiff.

Answer yes or no.

If you have answered question 6 "No", and only in that event, then do not answer questions 7, 8, or 9, but proceed to answer Question 10. If you have answered question 6 "Yes", then answer questions 7, 8 and 9.

Question 7. Do you find from a preponderance of the evidence that the defendant VWOA or Volkswagen South Central monopolized, attempted to monopolize, or conspired to monopolize, in violation of Section 2 of the Sherman Act? Burden of proof is on plaintiff.

Answer yes or no.

Question 8. Do you find from a preponderance of the evidence that the defendant VPC monopolized, attempted to monopolize, or conspired to monopolize, in violation of Section 2 of the Sherman Act? Burden of proof is on plaintiff.

Answer yes or no.

Question 9. Do you find from a preponderance of the evidence that the defendant VWAG monopolized, attempted to monopolize, or conspired to monopolize, in violation of Section 2 of the Sherman Act? Burden of proof is on plaintiff.

Answer yes or no.

Questions as to Section 7 of the Clayton Act.

Question 10. Do you find from a preponderance of the evidence that the relevant market in considering Section 7 of the Clayton Act was the manufacture and sale of air conditioners for only Volkswagen, Porsche and Audi automobiles, rather than either the manufacture and sale of air conditioners for all automobiles or for all compact automobiles. Burden of proof is on plaintiff.

Answer yes or no.

If you have answered question 10 "No" and only in that event, do not answer questions 11, 12 or 13, but proceed to answer question 14. If you have answered question 10 "Yes", then answer questions 11 and 12 as well as question 13, if applicable.

Question 11. Do you find from a preponderance of the evidence that the acquisition [sic] the assets of Intercontinental Motors by VWOA may substantially lessen competition in the sale of Volkswagen, Porsche and Audi air conditioners in violation of Section 7 the Clayton Act? Burden of proof is on plaintiff.

Answer yes or no.

strain trade unreasonably, in violation of Section 1 of the Sherman Act; and (b) conspired or attempted to monopolize, or monopolized, the sale of air-conditioners for Volkswagen, Porsche, and Audi automobiles throughout the world, in violation of Section 2 of the Sherman Act.

(3) The acquisition by VWoA of InterContinental Motors Corp. may substantially lessen competition in the

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Question 12. Do you find from a preponderance of the evidence that Delanair Engineering was a failing company? Burden of proof is on the defendants.

Answer yes or no.

If you have answered question 12 "Yes", do not answer question 13. If you have answered question 12 "No", proceed to answer question 13.

Question 13. Do you find from a preponderance of the evidence that the acquisition of the stock of Delanair Engineering by VWOA, either separately or in combination with the acquisition of Intercontinental Motors, may substantially lessen competition in the sale of Volkswagen, Porsche and Audi air conditioners in violation of Section 7 of the Clayton Act? Burden of proof is on plaintiff.

Answer yes or no.

Questions as to Proximate Cause and Damages.

If you have found as a result of your previous answers that one or more of the defendants have violated Section 1 of the Sherman Act and/or Section 2 of the Sherman Act and/or Section 7 of the Clayton Act, then answer question 14. Otherwise, do not answer such question.

Question 14. Do you find from a preponderance of the evidence that plaintiff Heatransfer Corporation sustained injury to its business or property which was directly and proximately caused by such violation or violations on the part of defendant or defendants? Burden of proof is on plaintiff.

Answer yes or no.

If you have answered question 14 "No" and only in that event, do not answer question 15. If you have answered such question "Yes", then proceed to answer question 15.

Question 15. What sum of money, if any, do you find would be required, if paid now in cash, to compensate plaintiff Heatransfer Corporation for any damages suffered by it by reason of such injury to its business or property which you have found was proximately caused by such violation or violations found in answer to interrogatory 14? Burden of proof is on plaintiff.

Answer by inserting the amount, if any.

sale of air-conditioners for Volkswagen, Porsche, and Audi automobiles, in violation of Section 7 of the Clayton Act.

(4) Delanair Engineering Co. was not a failing company, and VWoA's acquisition of Delanair may substantially lessen competition in the sale of air-conditioners for Volkswagen, Porsche, and Audi automobiles, in violation of Section 7 of the Clayton Act.

(5) Heatransfer sustained injury to its business or property that was directly and proximately caused by one or more of the violations found, and its damages were $5 million.

The damage award was trebled pursuant to 15 U.S.C., Section 15,[2] and an attorney's fee of $350,000 was added to the judgment, making a total judgment of $15,350,000.

III. THE FACTS

The facts as we state them were largely uncontroverted at trial, although sometimes subject to contrary inferences. As to facts in dispute, we state them in a manner consistent with the jury's Special Verdict, and as supported thereby.

A. *Background*

The distribution system of Volkswagen products in the United States is essentially VWoA. VWoA buys auto-

[2] The Clayton Act, § 4, 15 U.S.C. § 15 reads:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

mobiles and parts from VWAG for resale in this country. During the relevant time period, VWoA sold four basic types of Volkswagen vehicles: Type I—the "Beetle"; Type II—the "VW bus", a large station wagon, which is also available as a camper; Type III—a squareback, which is also available as a small station wagon; and Type IV—a larger, more powerful, version of the Type III. All of the above models have air-cooled engines mounted in the rear of the car, although in 1973, the Type III was replaced by the Dasher, which has a front-mounted, water-cooled engine.

Since 1969, VWoA has also imported the Porsche 911—an expensive sports car manufactured by Porsche; and the Porsche 914, an economy sports car manufactured jointly by VWAG and Porsche.[3] Both Porsche models have air-cooled engines. In 1970, VWoA began importing the Audi, a medium-sized car with a front-mounted, liquid cooled engine.

From its inception in 1956 until the early 1960's VWoA distributed the products it imported to 14 independent Volkswagen distributors in the continental United States.[4] These distributors were independently owned wholesale operations which purchased Volkswagen, Porsche, and Audi cars, parts, and accessories from VWoA, and purchased some parts and accessories from other suppliers as well. The distributors resold these products to the automobile dealers.[5] Beginning in the 1960's, VWoA began purchasing

[3] The Porsche had been imported into this country by an importer other than VWoA for a number of years prior to 1969.

[4] There was also one small distributor in Hawaii.

[5] At the time of trial, there were in this country approximately 1200 Volkswagen dealers, 300 Porsche-Audi dealers, with approximately 100 of these dealerships overlapping. Trial Record (T.R.), pp. 3530-3531.

these distributorship operations, and by the time of trial of this case it had acquired 8 of the original 14 distributorships.

By 1968, VWoA was selling more than a half million new Volkswagens per year in the United States, which amounted to just over 55% of all imported car sales, and 5.5% of the total United States car market. By 1970, Volkswagen sales mounted to 6.8% of total automobile sales in the United States, with approximately 570,000 Volkswagen sold that year. Its percentage of the foreign car market for 1970 was 46.2%. By 1973, due to much stronger competition from other importers, VWoA (Volkswagen, Porsche and Audi) maintained 31.3% of the imported car market, and the Volkswagen percentage of the total car market had fallen to 4.1%. These figures were still very impressive considering the increase of sales among domestic and foreign manufacturers of cars in direct competition with VWoA imports.

None of these cars imported by VWoA had factory-installed air-conditioners. Since air-conditioning was becoming almost a standard item in the United States by the end of the 1960s, there appeared to be a waiting market for an air-conditioner that would function satisfactorily in the VWoA imports.[6]

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[6] A primary reason for the lack of factory air-conditioning in the imported German cars may have been a belief by the importers that German air-conditioning manufacturers lacked expertise in the air-conditioning field. John Stuart Perkins, President of VWoA, testified at trial:

> You cannot find an engineer [in Germany] who understands air-conditioning. And we were not interested in having any part of air-conditioning from Germany, who are making their first air-conditioners, we would much sooner do business here in the States, particularly here in Texas, where it seemed to be the center of air-conditioning, where we had the talent, where we had the expertise, and were quite happy with that.

T.R., p. 3672.

VWAG first attempted in 1973 to install factory air-conditioning in automobiles for export to the United States. One thousand Audi cars were equipped with factory installed air-conditioners before being shipped to the United States. The results were not impressive. T.R., pp. 3674-3676.

B. *Automobile Air-Conditioning*

The basic components of an automobile air-conditioner are: the compressor; a pump, powered by the automobile engine, which circulates the coolant; the condenser, which uses the car's airflow, supplied principally by the car's movement and the radiator fan, to condense the coolant gas into liquid form; and the evaporator, where the liquid evaporates and is blown as cold air into the car.

In water-cooled cars, the condenser is placed in front of the radiator, so that outside air, "ramming" through the front of the car, can help to supply the condenser with its need for a flow of air coming over it. The main airflow, however, is supplied by the radiator fan.

In the air cooled, rear engine Beetle Volkswagen, this technique was not practicable. Ramming of outside air over the condenser would be impossible with the condenser in the rear with the engine. And, of course there was no radiator fan to provide the necessary constant airflow.

To overcome these problems, Don P. Dixon, founder of the DPD Manufacturing Company, designed a condenser that would fit behind the spare tire in the front compartment of the Beetle, and a separate fan that would provide independent airflow for the condenser. He also designed a compressor to fit in the rear engine compartment next to the engine, and an evaporator to fit partially in the front end of the car and partially under the dashboard in the passenger compartment. Because of the scattered place-

ment of the component parts of the air-conditioning unit, it was necessary to run hoses and electrical wires underneath the floorboard to make the component parts function as a working unit.

Delanair Engineering Company,[7] which became VWoA's approved supplier in 1963, had also designed a compressor to fit in the rear engine compartment next to the engine. The condenser system designed by Delanair, however, was markedly different from the DPD front-located condenser system. Delanair designed two condensers which were to be placed under the rear of the car. They were connected by tubing with a propeller fan blowing air over one of the condensers. The evaporator was placed entirely under the dash in the passenger compartment. The main defect with the Delanair unit was that the condensers were constantly exposed to damage because of their proximity to the road surface.[8] Aside from the difficulties associated with the DPD and the Delanair units, both offered at least some solution to the Beetle's lack of a radiator fan by providing independent airflow within the condenser system.

In 1963, Henry Willard Lende, Jr., formed a company, Heatransfer Corporation, for the purpose of selling the DPD units to Volkswagen dealers. Lende testified at trial that the main obstacle to his sales efforts were the problems encountered installing the unit:

> "Those fellows [working for the dealers] didn't know how to install an air conditioner, because it was

[7] Delanair was a subsidiary of an English company, Delaney-Gallay Ltd., itself in turn a subsidiary of another English company, Lindustries Ltd.

[8] A parts manager for a Volkswagen dealership testified that:

> "It would take us like two days to put an air conditioner in one and, you know, the thing would get down the road, three or four hundred miles down the road, and everything would fall off of it out in the middle of the road . . ."

> a new product, and it was an involved complicated product. You had mechanics putting mechanical things in a car, and then you had some chemistry in it, and you had to know how to put freon in, and you had to pull the air out of this, it's called pulling a vacuum before you put the freon, because if you have air in with the freon the thing won't work. You had to use a vacuum pump to pull all the air out, and you had to use gauges to put the freon in. You had to do a little electrical work, and then check it and know how to troubleshoot it.
>
> But before I would get out the door, he would say, 'Does my mechanic know how to fix this thing? Sure, it runs now, but if that customer comes back in, what are we going to do, I'm the fellow that's in the soup.'
>
> So, I teach the fellow how to troubleshoot and service that air conditioner, if it came in and wasn't working, what to look for first, was it out of freon, had a belt that slipped. Then, I go up and teach the salesmen how to sell it. They didn't know what knob did what, whether it was high, medium low fan, or what, and they didn't know what the thermostat did and all these things. It was a brand new industry. And if you didn't do this, didn't get the whole dealership squared away, they couldn't do a job of selling it." T.R., pp. 141-142.

With Lende's Heatransfer Corporation as its sales company, DPD's sales increased from 200 VW Beetle air-conditioning units in 1963 to 7000 units in 1968. During 1968, however, Lende learned of another unit being sold to Volkswagen dealers with the VWoA stamp of approval

(manufactured by Overseas Motors Corporation of Fort Worth, Texas—later Delanair Engineering Company), which was selling far more units to Volkswagen dealers than was DPD. Approval by VWoA meant that VWoA would purchase large quantities of the approved Delanair unit and sell them to Volkswagen dealers. Efforts by Lende and Dixon to secure VWoA approval of the DPD unit were unsuccessful.

Since a distributorship allowed the dealer the opportunity of ordering all of his parts and accessories from one central location rather than from a number of suppliers, Lende recognized that it would be advantageous to approach these distributors, rather than the individual dealers, concerning the purchase of DPD units. Because his unit was not approved by VWoA, he met with opposition, aggravated by VWoA's promotion of the Delanair unit.

In 1968, however, Lende's efforts were rewarded when the second largest seller of air-conditioners among the Volkswagen distributors, International Auto Sales in New Orleans, agreed to purchase units from DPD. Lende found this to be a particularly significant and encouraging development because it was the first time in his experience that a Volkswagen distributor had been willing to abandon an approved VWoA part or accessory for one that had not been approved. To Lende this indicated that other distributors might be willing to consider an alternative to the Delanair unit.

After securing the New Orleans business for DPD, Lende severed his relationship with that company. He had been developing his own concept of an air-conditioner for the Beetle, and decided that the time was ripe to produce and market that concept.

C. *The Heatransfer Unit*

In the Heatransfer unit all major component parts were located in the rear of the vehicle by placing the condenser and the evaporator in a box which was installed behind the back seat of the Beetle with a small opening in the floor pan behind the back seat which allowed the condenser to remove heat and further allowed the condenser-evaporator module to be connected by hoses to the engine compartment where the compressor was located. The unit was designed to feed cold air into the car's passenger compartment in a constant flow, along the roofline from the back of the car to the front of the car. The new unit was particularly distinctive for two reasons. It was relatively easy to install as compared with other units, and the location of the condenser reduced significantly the chance of damage to it.

As Lende began marketing Heatransfer units in early 1969, he approached Guenter Kittel, at the time VWoA's Vice President of Parts (he is presently President of a VWAG affiliate), concerning approval of the Heatransfer unit. Because Delanair was having severe problems at about this time, Lende had grounds for hope that his unit would get VWoA approval. At this same time, Lende was also soliciting Intercontinental Motors in San Antonio, Texas, the largest seller of air-conditioners among VWoA distributors. Intercontinental Motors agreed to purchase and sell the Heatransfer unit in June of 1969 even though it had not received the VWoA stamp of approval. By the end of the summer Heatransfer had sold 1800 units to Intercontinental.

At this time, Delanair was losing ground on other fronts. Delanair lost the business of the New Orleans distributorship to DPD, and the business of the California distributorship, Volkswagen Pacific, to Meierline, a California com-

pany. In the summer of 1969, distributor orders for the Delanair dropped drastically. VWoA had projected sales of 13,000 for the months of July, August, and September, but, in actuality, sales for those months amounted to 1280, 372 and 26 units respectively. Plaintiff's Exhibit (PX)—7.

Delanair's English-based parent company, Delaney-Gallay, Ltd., decided not to expend the effort to rehabilitate Delanair, but rather to sell it. On September 29, 1969, it was announced that VWoA had acquired Delanair for a new wholly-owned subsidiary which VWoA named Volkswagen Products Corporation (VPC). During the three months following the purchase of Delanair, VPC sales increased markedly in comparison with Delanair's preceding three months. In October 1, 1,399 units were sold, in November, 1,193 units, and in December, 999 units.

In October of 1969, VWoA acquired the largest American Volkswagen distributorship: Intercontinental Motors of San Antonio, and renamed it Volkswagen South Central Distributor, Inc. (VWSC). Before the acquisition Heatransfer had had a 65%-35% advantage over Delanair in terms of unit sales by Intercontinental to dealers. By the end of the first year after the acquisition, the advantage had been reversed, 63%-37%, in favor of VPC. There were no sales by Heatransfer to VWSC of any Heatransfer units after June, 1971, when their relationship was terminated.

The last Volkswagen distributor in the United States to do business with Heatransfer was Import Motors in Grand Rapids, Michigan, but sales fell when the distributor refused to install Heatransfer units in Volkswagens at its port facility. The relationship with Import Motors was terminated in June, 1972. After this time, Heatransfer continued to do business with franchised dealers on a direct basis, but the lack of access to distributors made it increasingly difficult to sell to VWoA's franchised dealers.

Lende next attempted to develop the "after market" for Volkswagen air conditioners. This term is used for the market consisting of cars originally sold by dealers without air-conditioners. There was little competition in this market for air-conditioners for Volkswagens and Lende received favorable response from both Sears Roebuck Company and J. C. Penny Company, two large retailing chains. The after market, however, was still not sufficient to sustain Heatransfer.

Lende also tried to push the Heatransfer unit on the foreign market, and met with some initial success. For example, he went to Brazil in late 1969, and secured an order for a shipment of Heatransfer units. After correspondence from VWAG to the purchaser, however, no additional Brazilian orders were forthcoming. We reproduce that correspondence in the margin.[9]

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[9] *Translation of letter from Volkswagenwerk A.G.*

December 17, 1969

Airconditioner for VW 1300

Dear Mr. Scholz:

We take reference to your letter number 223 of November 19th to Mr. Quinn, subject airconditioners for VW 1300.

A few months ago we already informed you that we are developing airconditioners in close cooperation with Delanair in the United States. In the interim Delanair has been acquired by Volkswagen of America and continues under the name of Volkswagen Products Corporation. Mr. Schlager is in charge of the company.

Because of your above letter we inform you of this and would like to suggest that you contact Mr. Schlager before carrying out tests with airconditioners of Heat Transfer Corporation because as far as we know such evaluations have already been carried out there. As Delanair belongs now to the combine we would suggest that all your problems are communicated to Delanair which certainly now is most interested to also assist you in this matter either from the United States or possibly with manfacturing in the country.

VOLKSWAGENWERK, A.G.
H. J. Radok

The best foreign market for Volkswagen air-conditioners appeared to be Japan, where the Heatransfer unit could fit Japan's right-hand drive vehicles without any major design change. In 1971, the Volkswagen importers in Japan bought 400 units from Heatransfer, and this amount increased to 1200 units in 1972. In 1973, however, sales dropped by 50% when the Japanese importer began purchasing VPC's newly designed right-hand drive unit.

Because of the continuing marketing problems, Lende and his associates decided in 1974 to liquidate Heatransfer Corporation.

IV. UNLAWFUL TYING

A tying arrangement, generally stated, is an agreement by which one party agrees to sell a product (the tying product), but only upon condition that the buying party also purchases another product (the tied product) which the buyer would ordinarily not purchase, where the effect is to substantially lessen competition. *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545, 549-550 (1958). In *Northern Pacific,* the Supreme Court stated:

> [Tying agreements] are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. *International Salt Co.* v. *United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20; Cf. *United States* v. *Paramount Pictures,* 334 U.S. 131, 156-159, 68 S.Ct. 915, 928-929, 92 L.Ed. 1260; *United States* v. *Griffith,* 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself.

356 U.S. at 6-7, 78 S.Ct. at 518-519, 2 L.E.2d at 550.

The Court then determined what was to be considered sufficient economic power of the seller to make the tying agreement an illegal one:

> While there is some language in the *Times-Picayune* [*Publishing Co.* v. *U.S.,* 345 U.S. 594, 73 S. Ct. 872, 97 L.Ed. 1277], opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a "not insubstantial" amount of interstate commerce is affected).

Id. at 11, 78 S.Ct. at 521, 2 L.Ed.2d at 553. See *Broussard* v. *Socony Mobil Oil Co.,* 350 F.2d 346 (5th Cir. 1965).

Thus, for a tying arrangement to be a violation of Section 1 of the Sherman Act [10] (as well as Section 3 of the Clayton Act, although a violation of that section of the Clayton Act is not presented to us on appeal) it must be shown that (1) the seller has sufficient economic power over the tying product, e. g., monopoly, market dominance, etc., to induce his customer, through economic leverage, to purchase the tied product along with the tying product, and (2) a not insubstantial amount of commerce in the tied product is restrained as a result. See *Sulmeyer* v. *Coca Cola Company,* 515 F.2d 835, 844 (5th Cir. 1975), cert. denied, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341.

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[10] The Sherman Act, § 1, 15 U.S.C. § 1, reads:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

In answers to written questions, the jury in the present case found, from what it believed to be a preponderance of the evidence, that the provisions of the Volkswagen dealer and distribution franchise agreements constituted tying agreements under Section 1 of the Sherman Act. It further found that such agreements were not necessary to preserve the goodwill of the defendants.

It is well established that tying arrangements are illegal *per se.* See, e.g., *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); *Miller* v. *Granados,* 529 F.2d 393 (5th Cir. 1976); *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.,* 549 F.2d 368 (5th Cir. 1977). That is to say, there are "certain categories of business arrangements . . . [which] exhibit a high likelihood of anticompetitive impact and offer virtually no prospect at all of enhancing competition. With respect to such arrangements, antitrust plaintiffs need not demonstrate unreasonableness; the conduct constitutes a *per se* violation of the Sherman Act. . . . The *per se* label indicates that a plaintiff need not demonstrate that the effects of the tie are unreasonable. Indeed, not only is the plaintiff relieved from establishing that the effects are unreasonable, but in addition the defendant is not free to demonstrate that the effects are reasonable or even affirmatively desirable". *Kentucky Fried Chicken, supra,* at 374-375. Of course this is not to say that the plaintiff is relieved from establishing that a tie-in has actually occurred. Lawful arrangements by any other name do not thereby become unlawful.

Appellants assert that there is nothing in the best efforts clauses in their franchise agreements on which to base a finding of an illegal *per se* tying agreement. Those agree-

ments contain provisions requiring the franchisee to use his "best efforts" to promote Volkswagen automobiles, parts, and accessories.[11] Looking at the "best efforts" clauses in isolation, as appellants would have us do, we would tend to agree with this view. But our duty is to look at the circumstances surrounding the use of these clauses to determine if violations of the antitrust laws occurred. "The presence of the illegal condition may be inferred from an extrinsic course of conduct supplementing the written contract". *Advance Business Systems & Supply Co.* v. *S.C.M. Corporation,* 415 F.2d 55, 64 (4th Cir. 1969), cert. denied, 397 U.S. 920, 90 S.Ct 928, 25 L.Ed.2d 101.

Initially, we reject appellant's argument that the court's charge to the jury allowed a finding of tying on the basis of the best efforts provisions standing alone. We view the court's tying arrangement instruction as sufficient to direct the jury to consider the means by which the provisions were enforced.[12]

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[11] For example, Plaintiff's Exhibit (PE)—142, Volkswagen Distributor Agreement, Article 6(1) provides: "Distributor will use its best efforts to promote the sale of VW Automobiles in the Territory through such means as may be specified from time to time by Directives and Suggestions."; and Article 7(1): "Distributor will use its best efforts to promote the sale of VW Parts in the Territory through such means as may be specified from time to time by Directives and Suggestions."

[12] The trial court's charge to the jury on tying was as follows:

A tying arrangement exists when a seller refuses to sell one product except on the condition that the buyer also purchase from the seller some other product, or service, which the buyer does not need or want, where the effect may be to substantially lessen competition. Tying arrangements are considered to be naturally anticompetitive since they deny free access to the market for the unwanted product, not because the party imposing the tying arrangement has a better product or a lower price, but because it has the power to force a product upon the purchaser. To constitute an illegal tying agreement, however, it is not enough that the seller simply possess economic power. That power must have been used to force the purchase of some unwanted product. There can be no illegal tie unless unlawful conduct by the seller influences the buyer's choice. For an antitrust violation, it is not necessary that the tying arrangement force a purchaser to buy only the product of the seller, but only that the amount of trade foreclosed by the agreement is more than merely insubstantial.

Moreover, a manufacturer may require its distributor to promote to customers all its products so long as the purchase of one product of the manufacturer is not tied to the purchase of another of the manufacturer's products.

Plaintiff alleges that the provisions of the distributor and dealer agreements and their interpretation by VWOA imposed the requirement on the distributors and dealers to purchase reasonable inventories of first Delanair and then VPC air conditioners and to promote the sale of these air conditioners, regardless of whether the distributors and dealers in fact wished to buy these VWOA approved air conditioners on the basis of the merits of the Delanair-VPC air conditioner when compared to the merits of the competing brands. The defendants deny this allegation saying that they have never required Volkswagen distributors and dealers to purchase Delanair-VPC air conditioners as a condition to purchasing Volkswagen automobiles. Second, they allege that they have never enforced the provisions of the distributor and dealer agreements relating to the promotion of approved parts and accessories and that they have never used any economic power to force distributors or dealers into buying Delanair-VPC air conditioners. On the contrary, defendants contend, as a practical matter, Volkswagen distributors and dealers have always been free to purchase any brand of air conditioner they desire.

Therefore, you must consider if, based on the evidence you have heard, it is more likely than not that Volkswagen distributors and dealers have purchased Delanair-VPC air conditioners because VWOA required them to do so as a condition to their also purchasing Volkwagen automobiles.

Even if you find the existence of a tying agreement, no violation of Section 1 of the Sherman Act should be found if you find such arrangement was reasonably necessary to protect the goodwill of the Volkswagen vehicles or trademarks. The protection of goodwill is a reasonable basis to justify an otherwise unlawful tying agreement. To establish this defense, the defendants have the burden to show that these provisions were reasonably necessary to assure that the products idetntified by the Volkswagen trademarks were available at the places identified by such trademarks to assure adequate service and parts to such products, or to provide quality products.

It is obvious that VWoA had sufficient economic power in the tying product, Volkswagen automobiles, to "strong-

ly urge" Volkswagen distributors and dealers to purchase VWoA approved parts, the tied product. It is also obvious that more than an insubstantial amount of interstate commerce was affected. See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 501-502, 89 S.Ct. 1252, 1258, 22 L.Ed.2d 495, 503-504 (1969).

We held in a recent case that "it is not enough to show that the seller has sufficient economic power and that two products were purchased together. In addition, it must be shown that the purchaser was coerced into purchasing an unwanted product." *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1327 (5th Cir. 1976). But Leasco involved a suit by franchisees against a franchisor claiming antitrust violations. In that type of action, a party to a contract is alleging that the contract is being illegally enforced against it or is illegal on its face. Courts are understandably reluctant to find such contracts to be illegal absent a fairly strong showing of coercion. In cases like the one at bar, on the other hand, an independent supplier to the franchisees asserts harm to it because of antitrust violations by the franchisor. The fact of coercion appears less important in this situation then the fact of foreclosure. If franchisees are coerced or "persuaded" to buy goods which they otherwise would not buy, with the result being tremendous lessening of the market in which a competitor sells his product, such a showing is sufficient to submit the question of a Section 1 antitrust violation to the jury.

If you have found that a tying arrangement exists but that the provisions of the franchise agreement were reasonably necessary to protect the defendants' goodwill, then you cannot find that the provisions of the franchise agreement violated Section 1. On the other hand, if you found that a tying arrangement exists and if you believe that these provisions were not reasonably necessary to protect Volkswagen's goodwill, then you must find a violation of Section 1.

We think the evidence as a whole, including correspondence and memoranda from Guenter Kittel, Vice President of VWoA at the time, and VPC records, provided ample basis for a jury to find that distributors and dealers, as a result of the best efforts clauses as enforced,[13] were urged to stock the Delanair/VPC air-conditioner, even though the franchise agreement, on its face, allowed the purchase of other units. We indicate the source of this evidence in the margin.[14] It is too voluminous to reproduce in full. That same evidence also appears to us a sufficient basis upon which a jury could reject the appellant's defense that the tying arrangement was necessary to preserve the goodwill of defendants.

It is of course not our holding that all best efforts clauses are violations *per se* of the antitrust laws, but we find that an inquiry into the circumstances surrounding the best efforts clauses and their implementation in the present case sufficiently raised in this respect significant questions for jury determination. We view the record as supporting the jury's finding that the best efforts clauses here, as implemented, were tying arrangements of the type which the antitrust laws were designed to prevent, and, as such, were *per se* violations of Section 1 of the Sherman Act.

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[13] It is necessary to determining whether the persuasion or coercion was a product of enforcement of the best efforts clauses since the tying violation found by the jury, in answer to Interrogatory #1, specifically referred to the best efforts clauses (distributor franchise agreements). See footnote 1, *supra*.

[14] The following sources are not all inclusive, but furnish ample evidence for a jury to find the existence of antitrust violations. Guenter Kittel memoranda—Plaintiff's Exhibits 98, 100, 104, 117, 264, 638; VPC sales reports, etc.—Plaintiff's Exhibits 9, 35-41; R. pp. 199-208, 3074-3077, 3533-3539, 3714-3719, 3746-3749, 4615-4618.

V. CONSPIRACY IN RESTRAINT OF TRADE

In answer to written interrogatories[15] the jury found that VWoA, VWAG and VPC were part of a conspiracy to restrain trade in violation of Section 1. We have already determined that there was sufficient evidence for the jury to find that the franchise agreement best efforts clauses of VWoA were tying arrangements that unreasonably restrained trade. In our discussion of the acquisition of Delanair, infra, we, likewise, find sufficient evidence to uphold the jury's finding of an antitrust violation which tended to restrain trade. These are two clear indicia of conspiring to restrain trade. In addition, the proof that VPC and VWoA arranged to pre-air condition a substantial percentage of cars at port installation centers before delivering those cars to dealers was evidence of a conspiracy to restrain trade. Further the evidence showed that certain dealers would not carry the Heatransfer unit because it was not approved by VWoA for reasons, it appeared, other than performance. Officials of VWAG and of VPC, the evidence showed, met several times to coordinate the development of the Volkswagen vehicles and the VPC air-conditioning unit. The competition was excluded from these meetings and was denied the information disclosed there.

Additionally, several memoranda were submitted in evidence, from which the jury could find attempts to restrain trade. However in view of the fact that we have found ample evidence in the record to show that the best efforts clause, as implemented, was a *per se* violation, it is unnecessary to further analyze the evidence to determine whether there was shown to have been an unreasonable restraint of trade. This is so since a *per se* violation is *ipso facto* an unreasonable restraint of trade.

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[15] See Questions 3, 4 and 5, note 1, *supra*.

VI. RELEVANT MARKET OFFENSES

A. *Relevant Market*

In *United States* v. *E. I. duPont de Nemours Co.*, 351 U.S. 377, 393, 76 S.Ct. 994, 1006, 100 L.Ed. 1264 (1956), the Supreme Court stated that "[s]ection 2[16] requires the application of a reasonable approach in determining the existence of monopoly power . . . " Thus, before it can be determined whether a monopoly exists it must be determined what the relevant market in the present case is.

Relevant market is essentially a question of fact, so that findings concerning this subject should be overturned on appeal only if clearly erroneous, or where there is a dearth of evidence to support the finding below. See *Yoder Brothers, Inc.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1366 (5th Cir. 1976); *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975), cert. denied, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341; *Telex Corporation* v. *International Business Machines Corp.*, 510 F.2d 894, 915 (10th Cir. 1975), cert. dismissed, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244.

Relevant market may be defined on the basis of geographical boundaries of the market, *Indiana Farmer's Guide Co.* v. *Prairie Farmer Pub. Co.*, 293 U.S. 268, 55 S.Ct. 182, 79 L.Ed. 356 (1934), and on the basis of product differentiation, *United States* v. *E. I. duPont de Nemours & Co., supra*. We are concerned with the latter on this appeal. The Supreme Court has stated that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets

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[16] Of the Sherman Act.

may exist which, in themselves constitute product markets for antitrust purposes. *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-595, 77 S.Ct. 872, [877-878], 1 L.Ed.2d 1057, [1066-1068]. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523-1524, 8 L.Ed.2d 510, 535-536 (1962).

If the relevant market is, as appellants argue, air-conditioners for all automobiles or, at the very least, for small foreign automobiles, the violations found by the jury, based on the relevant market encompassing only VWoA imported cars, must be overturned. If, however, appellees submitted sufficient evidence to support their view of what comprised the relevant market, we should not disturb that finding. We will attempt a brief review of the evidence submitted.

It seems from the record that the major competitors for the Volkswagen air-conditioning market were DPD, Meierline, Heatransfer, and Delanair/VPC. Indeed, this was found to be so when appellants conducted a study of Delanair shortly before that company was acquired by appellants. See Plaintiff's Exhibit 7, Acquisition Audit of Delanair Engineering Company, p. 7. With few exceptions, these companies produced air-conditioning units almost exclusively for VWoA import cars, concentrating on this market because of the distinct engineering problems associated with the Volkswagen imports. Further, up until the time of trial in this case, these four competitors were the sole suppliers of air-conditioners for VWoA.

While Heatransfer developed an air-conditioning unit for the Opel, it never sold units to any company save VWoA and VWAG, or their distributors. Meierline and DPD did sell units to other automobile manufacturers besides VWoA, but these sales were insignificant compared to sales to VWoA. During its first three years in business, Delanair sold some 2,670 air-conditioning units for installation in vehicles other than VWoA imports. This amounted to about 10% of Delanair's total sales during that period. By its third year in operation, however, from the time it first became profitable, Delanair "sold air-conditioners almost exclusively for installation in Volkswagen vehicles". Plaintiff's Exhibit 7, p. 5. VPC, although it made prototypes for other automobiles, has never actually sold air-conditioners to any other manufacturers. All these things are supportive, *vis-a-vis Brown Shoe*, of the jury's finding as to the relevant market.

Appellants argue that such cases as *Telex Corp.* v. *International Business Machines Corp.*, *supra*, *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975), and *ITT Corp.* v. *GTE Corp.*, 518 F.2d 913 (9th Cir. 1975), support their argument that the relevant market should be broader than that determined by the jury. Those cases deal with the adaptability or substitutability of products, and contain nothing that persuades us to overturn the finding of the reply to Question 6 that the relevant market in considering Section 2 of the Sherman Act was the manufacture and sale of air-conditioners for only Volkswagen, Porsche and Audi automobiles throughout the world. We have carefully perused the briefs in this case and the relevant records and exhibits. As we understand the points of contention, we cannot find, as a

matter of law, that the jury's factual finding as to relevant market was not supported by the evidence. See *Sulmeyer* v. *Coca Cola Co., supra,* 515 F.2d at 849.

B. *Unlawful Monopolization, Attempt to Monopolize, and Conspiracy to Monopolize*

Having approved the jury's finding as to the relevant market, we consider the proof as to the unlawful monopolization, attempt to monopolize, and conspiracy to monopolize charges. Under Section 2 of the Sherman Act [17] the offense of monopoly has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident". *United States* v. *Grinnell Corporation,* 384 U.S. 563, 570-571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778, 786. Once the relevant market has been determined, the existence of monopoly power "ordinarily may be inferred from the predominant share of the market". Id. at 571, 86 S.Ct. at 1704, 16 L.Ed.2d at 786. The evidence in the record appears to support appellee's estimate that appellants' market control was between 71%-76% during the years 1971-1973. See Plaintiff's Exhibits 9-10; R. pp. 1907-1912, 1929-1930. Such a share of the relevant market is sufficient

[17] The Sherman Act, § 2, 15 U.S.C. § 2, reads:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

to establish a monopoly power. See *United States* v. *E. I. duPont de Nemours & Co.,* 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); *United States* v. *United Shoe* [*sic*] *Machinery Corp.,* 110 F.Supp. 295 (D.Mass. 1953), aff'd per curiam, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954).

The willful acquisition or maintenance of the monopoly power can be demonstrated by "conduct designed to barricade access to markets or inhibit production . . ." *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America,* 438 F.2d 1286, 1307 (5th Cir. 1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736. We have already upheld the jury's verdict finding the existence of a tying agreement. This in itself is substantial evidence of narrowing access and prohibiting production. Our affirmance, infra, of the violation of Section 7 of the Clayton Act, through the acquisition of Delanair and Intercontinental Motors, is further supportive of the finding by the jury that the monopoly power was willfully attained.

C. *Acquisition of Delanair and Intercontinental Motors*

The jury found that appellants violated Section 7 of the Clayton Act [18] by acquiring Delanair and Intercontinental

[18] The Clayton Act, § 7, 15 U.S.C. § 18, reads in pertinent part:

No corporation shall acquire, directly or indirectly, the whole or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section

Motors. A violation of Section 7 occurs when a corporation acquires the whole or any part of another corporation also engaged in commerce, where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."

The Supreme Court has stated that "[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition'. Substantiality can be determined only in terms of the market affected." *United States* v. *E .I. duPont de Nemours & Co.*, 353 U.S. 586, 593, 77 S.Ct. 872, 877, 1 L.Ed.2d 1057, 1067 (1957). We have already upheld the jury finding that relevant market in this case was air-conditioning units for Volkswagen vehicles. Our present task is only to determine whether there was sufficient evidence upon which a jury could find that the effect of the acquisition may have been substantially to lessen competition, or to tend to create a monopoly.

Volkswagen air-conditioning units were sold mainly through the efforts of VWoA and the regional distributors. By acquiring Delanair, one of the manufacturers competing for VWoA business, it was shown that VWoA while not formally forbidding dealers and distributors from buying other air-conditioning units, had severely limited the chance of VWoA approval of any other unit, thus curtailing the marketability of those other units. It was further shown that following the acquisition of Delanair, that company, doing business as VPC, substantially increased its sales in a short period of time. See Plaintiff's Exhibits, 7, 8, 618A. Also, for times relevant to this trial, testimony and evidence was presented, already discussed, which supported a finding of VPC's subsequent dominance of the market to well over 70%. After the acquisition of Intercontinental Motors, sales of the VPC unit increased markedly (see discussion under The Facts, Part III of this opinion, *supra*), to the detriment of other suppliers. The composite effect of this evidence, together with other evidence substantiating the Section 7 violation, persuades us that there was sufficient evidence for the jury to conclude—as it did—that the acquisitions substantially foreclosed competition. See *Ford Motor Company* v. *United States*, 405 U.S. 562, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972).

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of the country, the effect of such acquisition, of such stock or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

VII. FAILING COMPANY DEFENSE

The jury rejected the appellants' defense that Delanair was a failing company and hence that the acquisition of it by VWoA did not violate Section 7, pursuant to *International Shoe Co.* v. *FTC*, 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431 (1930). In *International Shoe*, the corporation involved had its "resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability

of a busines failure. . . .'' Id. at 302, 50 S.Ct. at 93, 74 L.Ed. at 443. But in *Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969), the Court added a further requirement to use of the failing company doctrine:

''The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser. For if another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power.'' Id. at 138, 89 S.Ct. at 931, 22 L.Ed.2d at 156.

Delaney-Gallay, the parent company of Delanair, made an attempt to sell Delanair to DPD, but that plan fell through. Subsequently, of course, Delanair was purchased by VWoA. There is nothing in the record that supports the theory that Delanair would collapse but for the acquisition. Indeed, the major reason for getting rid of Delanair appeared to be the desire of Delanair-Gallay to get it off the company books before the end of the fiscal year. This rush factor also discounts viewing VWoA as the only possible purchaser. The evidence disclosed no affirmative effort to sell Delanair on the open market.

We find nothing which persuades us to reverse the jury's verdict for appellee in this respect. Indeed, we find ample support in the record for the verdict's rejection of the failing company defense.

VIII. CAUSATION AND DAMAGES

A. *Causation*

Initially, we address the question of causation, for affirmance of the award of damages to appellee certainly cannot stand absent a finding that appellants' actions were the proximate cause of the damages sustained. The record supports the jury's finding that Heatransfer sustained injury to its business caused by appellants' violations of the antitrust laws, already discussed at length in this opinion. Appellants attempted to show that any damages suffered by appellee were suffered solely because of various shortcomings on the part of appellee, including less than adequate product, lack of perseverance, and haphazard sales efforts. But these contentions were amply rebutted in each particular by appellee's proof. Therefore, no basis exists for us to determine as a matter of law that the evidence did not support the jury's finding of causation. See *Keogh* v. *Chicago & N. W. Ry. Co.,* 260 U.S. 156, 165, 43 S.Ct. 47, 50, 67 L.Ed. 183, 188-189 (1922); *M. C. Manufacturing Co.* v. *Texas Foundaries, Inc.,* 517 F.2d 1059 (5th Cir. 1975), cert. denied 424 U.S. 968, 96 S.Ct. 1466, 47 L.Ed.2d 736.

B. *Damages*

Appellee presented two theories at trial in an attempt to project its damages as a result of lost sales. Method I assumed that, absent any antitrust violations, Heatransfer would have had the same sales through the damage period, relative to VPC sales, as it experienced in the pre-damage, or base, period, relative to Delanair/VPC. The trial court instructed the jury to disregard Method I, for VPC sales would have included presumptively the sales lost by Heatransfer, Meierline, and DPD, because of appellants' antitrust violations.

Method II, the theory upon which the jury based its findings as to damages, relied on four assumptions relative

to the finding of lost sales: (1) that plaintiff suffered damages; (2) that the damage period extended from November 1969, through December 1973; (3) that the base period, that is, the period when there was no impediment to competition, extended from June 1969, through October 1969; and (4) that Heatransfer would have produced and marketed air-conditioning units for Volkswagen Types 2, 3 and 4 and for the Audi during the damage period. Three further assumptions upon which Method II was premised, relative to the actual calculation of damages, were as follows: (1) Delanair sales would have declined at a constant rate but for the anti-competitive activity; (2) the relative market shares of Heatransfer, DPD, and Meierline would have remained constant; and (3) Heatransfer would have captured the same market shares for units manufactured for other types of Volkswagen vehicles.

This Court stated in *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 695 (5th Cir. 1975), cert. denied, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349: "We recognize that leniency should be permitted in showing damages in private antitrust actions, however, a damage assessment based wholly on speculation and guesswork is improper." We do not find these assumptions so speculative as to render the damages judgment based upon them unfounded. All such assumptions were supported by the record as exemplified by the testimony and exhibits.[19] Aside from the margin references and the evidence previously discussed, this opinion would be extended unnecessarily if we explored the evidence in detail and at further depth. We add simply

[19] There was, for example, evidence of Delanair's continued decline; of the growing dissatisfaction with the Delanair unit, with no sign of improvement; there was no evidence of new entrants into the market, so as to dispel evidence that market share would remain the same; there was evidence regarding the merits and weaknesses of the different competing units, there was also evidence that Heatransfer would have produced and marketed air-conditioning units for Volkswagen Types 2, 3, 4, and Audi during the damage period, and had, in fact, begun to design units for Types 2 and 3.

that there was amply evidence to dispel any concern that the jury's determination, based on the given assumptions, was the result of guesswork and speculation.

Having concluded that the assumptions upon which the jury based its findings of damages were valid, it is appropriate to direct our scrutiny to that finding itself. Utilizing Method II, the already mentioned appellee's expert witness testified that he projected that Heatransfer would have sold 87,000 units over the damage period absent the antitrust violations. These sales, he testified, would have yielded approximately $2.1 million in net profits before taxes for Heatransfer. Thus, $2.1 million in profits were lost because of the antitrust violations. Further, because of loss of those net profits, the expert witness calculated that there would be a concomitant loss to capital value of approximately $3.5 million. It was from these figures that the jury fashioned its damage award of $5 million.

In *Bigelow* v. *R. K. O. Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946), the Court observed that a plaintiff in a treble damage case need not prove damages with the exactness which would have been possible under freely competitive conditions. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created". Id. at 265, 66 S.Ct. at 580, 90 L.Ed. at 660. Once it has been shown that damages have resulted, it is only necessary that plaintiff present reasonable evidence as to the amount of those damages. Such a showing was made in the present case, and we are unwilling to substitute our concept of damages for the judgment made by the jury and upheld by the trial court. See *Hobart Brothers Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 902 (5th Cir. 1973), cert. denied, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150.

In a recent Supreme Court decision, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc,.* —— U.S. ——, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), the question presented to the Court was "whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares." Id. at ——, 97 S.Ct. at 695, 50 L.Ed.2d at 709. In *Brunswick,* the petitioner, one of the two largest manufacturers and distributors of bowling equipment in the United States, found that it was owed more than $400 million for equipment supplied on extended credit terms. To get necessary cash, the corporation began to repossess some equipment and sell it to third parties. Where such sales were not feasible, petitioner would take over the bowling centers and operate them itself. Six of the bowling centers that petitioner began operating were in competition with respondents' bowling centers.

Respondents sued, alleging that the acquisitions by petitioner might substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. Respondents' damage theory put forth the argument that but for Brunswick's acquisition of the six bowling centers, those centers would have gone out of business, leaving their customers to respondents. Respondents argued therefore that their injury was measured by the profits lost due to petitioner's acquisition of the six bowling centers.

The trial court allowed this theory to be submitted to the jury as a basis for finding damages. The Court of Appeals found no basic fault with the theory of damages but remanded stating that respondent must prove that the bowling centers would, in fact, have failed.

The Supreme Court saw some difficulty in "intermeshing" Section 7, which prohibits certain acts with a potential

to cause harm, with Section 4, which attempts to remedy such harms.

> Plainly, to recover damages respondents must prove more than that petitioner violated §7, since such proof establishes only that injury may result. Respondents contend that the only additional element they need demonstrate is that they are in a worse position than they would have been had petitioner not committed those acts. The Court of Appeals agreed, holding compensable any loss "causally linked" to "the mere presence of the violator in the market." *NBO Industries Treadway Companies* v. *Brunswick Corp.,* 523 F.2d [262], at 272-273 [3 Cir.]. Because this holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so, we cannot agree with it.
>
> Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holding, once a merger is found to violate § 7, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the reason the merger was condemned. This holding would make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws.

Id. at ——, 97 S.Ct. at 696-697, 50 L.Ed.2d at 711.

The Supreme Court thus held that for respondents to recover treble damages because of a Section 7 violation,

they must prove more than a causal link to an illegal presence in the market. They must prove antitrust injury, "which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation". Id. at ——, 97 S.Ct. at 697, 50 L.Ed.2d at 712.

In the present case, the violations allegedly caused by VWoA's acquisition of Delanair go beyond the casual link rejected by the Supreme Court in *Brunswick*. In *Heatransfer*, the acquisition of Delanair did more than merely keep Heatransfer and other competitors from gaining sales that would have resulted had Delanair continued to decline. There was substantial evidence presented that by acquiring Delanair, VWoA virtually precluded any of the competitors in the Volkswagen air-conditioning unit market from openly competing with the VWoA company. Theoretically, if Delanair had been acquired by any other company, save VWoA, the market would still be open to competition. By acquiring Delanair itself, VWoA had an uncontested financial interest in the success of the newly acquired company. It was to VWoA's advantage to deal as much as possible with VPC/Delanair to the exclusion of other competitors—and competition. Such a consequence is surely an antitrust injury that reflects "the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation". Brunswick, *supra*. It is "the type of loss that the claimed violations of the antitrust laws would be likely to cause". *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125, 89 S.Ct. 1562, 1577, 23 L.Ed.2d 129, 149 (1969).

We come finally to appellants' contention that it is flagrantly inconsistent for appellee to argue that Delanair was not a failing company. Heatransfer counters that it

"merely assumed that the acquired company had been fairly beaten and would continue to decline as a market force. It was absolutely not assumed that Delanair would somehow have evaporated or gone into liquidation as of the date of acquisition or anytime during the damage period". Appellee's Supp. Br., p. 14.

It is sound principle to require that a plaintiff seeking damages not put forth proof of damages inconsistent with the proof utilized to establish an antitrust violation. Thus, it would be inconsistent, and unacceptable, to allow a plaintiff to establish that a failing company defense was not applicable to the acquiring company, while at the same time proving, as a necessary element of some sort of damage claim, that the acquiring company would have failed but for the acquisition by defendant. See Areeda, Antitrust Violations Without Damage Recoveries, 89 Harv.L. Rev. 1127, 1132-1133, n. 4 (1976).

In this case, however, appellee did not argue, nor did it prove, that Delanair was a failing company. As we have discussed previously, a failing company, for the purposes of asserting that status as a defense to an otherwise illegal acquisition, is one where resources are so depleted and chances of rehabilitation so remote that business failure is all but a foregone conclusion. To defend the acquisition of such a company by a company which would otherwise be violating antitrust laws, it is further necessary to show that the acquiring company was the sole available purchaser. None of these elements was proved in the present case. Appellee merely asserts that Delanair's downward trend would have continued, to the advantage of other competitors. This is not inconsistent with a rejection of the failing company defense.

The damage computations were heatedly opposed and attacked by defendants in the several briefs they submitted to this Court. After careful review of their

objections we find no basis for us to overturn the jury finding on the question of damages. The essential damage element questions not already addressed by us were substantially reviewed by the court below in its consideration of appellants' motion for judgment n.o.v. or for a new trial. We adopt those views and reproduce them in the margin.[20]

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20 [*Plaintiff's Market Share*]

Defendants attack the jury's assumption that Heatransfer's portion of the total sales relative to the other competitors would have remained constant during the damage period but for the unlawful activities of the defendants. They allege that such an assumption is speculative and contrary to the evidence because it fails to consider new entrants into the market and because it fails to take into account the sales Heatransfer would have lost to DPD.

The assumption that Heatransfer's market share would remain constant is not contrary to the evidence. First, there is no evidence of any potential new entrants into the market. Second, although there is some evidence to the effect that the relationship between DPD and Heatransfer changed with regard to their respective market shares, there is also evidence that this was the result of the newer company's inability to establish itself because of the defendants' anti-competitive practices. Furthermore, during the course of the trial, the jury was presented evidence regarding methods of marketing, the merits and weaknesses of each individual competitor's product, the trends developing within the market, etc. It cannot be said that the inference that plaintiff's sales would have remained constant was made by the jury without a proper consideration of market conditions. Accordingly, the jury's determination to infer that the market shares of each competitor would remain constant cannot be said to be contrary to the evidence or to rest on speculation and guesswork.

[*New Products*]

Defendants also challenge the sufficiency of evidence to support the jury's assumption that plaintiff would have had the same success in marketing units for other models as it had in marketing its Type I unit. Although the evidence to support this assumption is not extensive, it is supported by the testimony of Bill Lende who testified that it was necessary to have a full line of air conditioners for the Volkswagen family in order to sell any one type of unit. Lende attributed this necessity to the fact that dealers generally preferred to purchase a full line of products from one manufacturer in order to assure the availability of spare parts and service. Based upon this testimony, it was reasonable for a jury to infer that a manufacturer's customer for Type I units would remain his customer in purchasing units for other vehicles.

NOTE 20--Continued

The Court finds no merit in defendants' argument that the volume of unit sales during the damage period would be less than that actually achieved if VPC had not been a competitor within the relevant market. Although there is evidence demonstrating that VPC did develop new units and did organize an active sales force, it is also readily apparent from the record that other manufacturers were engaged in development of new units to the same extent of [sic] VPC. Indeed, DPD preceded VPC in some instances. Furthermore, there is no evidence to indicate that the tenacity of the VPC sales force was any greater than that attributable to other manufacturers. Accordingly, the inference that the size of the market would remain the same without the acquisition of Delanair by VWAG is reasonable and supported by sufficient evidence.

[*Damages After Quitting Business*]

Lastly, defendants argue that damages cannot be awarded to the plaintiff for that period of time subsequent to Lende's decision to withdraw from competition with VPC. The fact that Lende voluntarily withdrew from the market is irrelevant in determining if plaintiff is entitled to recover damages. "The antitrust law does not require a plaintiff to retain possession of a business oppressed by antitrust violation until the business is bankrupt or directly shut down by the violator." *Pollack & Riley, Inc. v. Pearl Brewing Co.* [1974-2 Trade Cases ¶ 75,191], 498 F.2d 1240, 1244 (5th Cir. 1974); accord *Lehrman v. Gulf Oil Corp.* [1972 Trade Cases ¶75,054], 464 F.2d 26, 45 (5th Cir.), cert. denied, 409 U.S. 1077, [93 S.Ct. 687, 34 L.Ed.2d 665] (1972). The question of whether the plaintiff withdrew from the market because it was forced out by the actions of the defendant or whether it withdrew for other reasons was an issue of fact to be determined by the jury in responding to the interrogatory relative to causation. Upon a finding that the defendants' conduct caused the plaintiff's injury, an award for damages subsequent to the plaintiff's withdrawal from the market is not erroneous.

ELEMENTS OF DAMAGES RECOVERABLE AS A MATTER OF LAW

Sales and Profits Allegedly Lost to DPD

Defendants argue that a certain percentage of plaintiff's damage calculations premised upon Method II is unrecoverable because it represents sales lost to DPD rather than VPC. The Court has carefully reviewed the defendants' calculations submitted in support of their argument and finds that they are inconsistent with the damage formula that forms the basis for Method II. Method II was premised upon total industry sales; however, defendants' calculations do not include sales made by VPC. Accordingly, the Court finds the defendants' argument to be devoid of merit.

NOTE 20—Continued

Lost Capital Value

Defendants ask the Court to remit a portion of the damages awarded by the jury that may be attributable to lost capital value. This request is premised upon their argument that lost capital value should be calculated as of April, 1970, the date that Lende decided to concentrate on marketing the Heatransfer unit in the "after market", rather than the date of trial.

Plaintiff is correct in assessing lost capital value as of the date of trial, rather than April, 1970. Lost capital value is to be determined at the date that a business ceases to do business. See, e.g., *Farmington Dowel Products Co. v. Forster Manufacturing Co.* [1970 Trade Cases ¶ 73,075], 421 F.2d 61 (1st Cir. 1969). In the instant case, plaintiff's decision in April, 1970, is no indication that plaintiff ceased doing business altogether. In this regard, the evidence demonstrated that Heatransfer continued to compete in the relevant market long after the April, 1970, date and even attempted to reenter the market in 1973, only to find that the previous anti-competitive conditions continued to exist. Because Heatransfer continued to exist and, to some extent, compete until the time of trial, even though it was terminating its operations at that time, lost capital value was properly assessed as of the trial date.

[*Interest*]

Additionally, defendants challenge the inclusion in the claim for damages of $326,000.00 in interest on the capital value computation, arguing that prejudgment interest is not allowable as a matter of law. Plaintiff supports this award by arguing that the damage figure for interest does not represent prejudgment interest but is simply a vehicle for establishing capital value loss at the date of trial. In this regard, plaintiff, through its expert witness, demonstrated what its capital value loss would be as of December 31, 1973. Then, because figures for lost sales and profits were not available for the eight-month period of 1974 prior to trial, plaintiff's expert calculated lost capital value as of the date of trial by adding to the figure for December 31, 1973, an amount equal to a reasonable return on the capital loss value as of December 31, 1973, for the eight-month period of 1974.

In the light of this explanation, the Court does not find that the portion of the damage award labeled "interest" can be considered "prejudgment interest" that is prohibited as a matter of law. Further, although the Court does entertain some reservations with regard to the determination of capital loss value in this manner, it appears that remittitur of the sum labeled interest would result in no change in the judgment in view of the applicable rule in this Circuit that a court may not remit damages below that a jury might have awarded. See, *Jenkins v. Aquatic Contractors & Engineers*, 446 F.2d 520 (5th Cir.

NOTE 20—Continued

1971); *Glazer v. Glazer*, 278 F.Supp. 476 (E.D.La. 1968). In this regard, the $5,000,000 verdict is less than the jury might have awarded, even if the interest figure were not included in the damage claim. Accordingly, remittitur premised upon the inclusion of interest on the capital value loss in the damage claim will be denied.

Profits from the Sale of "Other Model" Units

[*Preparedness and Intentions*]

Defendants ask that the Court remit that portion of the damage award attributable to profits from the lost sales of units for "other models" because the plaintiff lacked the necessary "business or property" interest in the sale of units for vehicles other than Type I to permit the plaintiff to recover damages under § 4 of the Clayton Act. This request is based upon the argument that the plaintiff failed to demonstrate sufficiently that it had the preparedness and intention to engage in the manufacture of these additional units, a status that is necessary before an injured party who is about to engage in a business or to expand an existing business must prove before he has standing to claim that he has been injured.

In response, plaintiff admits that it never took affirmative steps in manufacturing these units. However, it argues that proof of preparedness and intention is relevant only to the threshold question of standing and that it has adequately demonstrated its standing through proof that Heatransfer was a going concern engaged in the manufacture of air conditioners for Volkswagen automobiles. In this regard, plaintiff asserts that the question of whether it can recover for lost sales for types of units that it never manufactured is a question relative only to the damage portion of the trial and thus does not subject it to the heavier burden of proof for standing of preparedness and intention to enter a business.

It is undisputed that a plaintiff who has attempted to enter a market but who has not succeeded must demonstrate his preparedness and intention to enter that maket before he may recover damages for an antitrust violation that foreclosed the market to him. See e.g., *Martin v. Phillips Petroleum Co.* [1966 Trade Cases ¶ 71,845], 365 F.2d 629 (5th Cir. 1966). Furthermore, even though an antitrust plaintiff operates a going concern, he must demonstrate his preparedness and intent to expand that business into a new market if he claims that expansion of that business into a new market has been foreclosed to him by the monopolistic activities of the defendant. See *Zenith Radio Corp. v. Hazeltine Research* [1969 Trade Cases ¶ 72,800], 395 U.S. 100 [89 S.Ct. 1562, 23 L.Ed.2d 129] (1969); *Volasco Products Co. v. Lloyd A. Fry Co.* [1962 Trade Cases ¶ 70,451], 308 F.2d 383 (6th Cir. 1962). However, the Court does not believe that a going concern, which is the victim of an anti-competitive practice, must forego damages for sales it would have

NOTE 20—Continued

made as the result of the natural expansion of its business simply because it was victimized early in its existence before its attempts to expand could ripen into evidence of preparedness and intent to increase its output. Thus, the question for the Court's determination is whether, under the facts of the present case, the manufacture of units for each type of Volkswagen vehicle in the relevant market can be considered the expansion of a present business into a new market for purposes of standing, or simply one facet of growth in an ongoing business for purposes of damages. The line to be drawn between expansion into new areas and growth in established ones is not easily defined and one that must be determined from the facts of each case.

In the present case, the Court, after much consideration, finds that the sale of "other model" units should be considered as a damage issue. Plaintiff has sufficiently demonstrated that it had a business or property interest in a going concern that had the manufacturing capacity and the market for units for the entire Volkswagen family of automobiles. Testimony at the trial indicated that Volkswagen dealers expected an air conditioner manufacturer to develop a complete line and that these dealers preferred to deal with only one manufacturer who manufactured an entire line to satisfy their needs. It appears that the two major competitors in the market, DPD and VPC, developed additional units during the damage period, even though they manufactured during the base period just about the same variety of units as Heatransfer. Thus, the likelihood for growth and expansion of a business such as that of Heatransfer is evident.

Furthermore, there is evidence to indicate that the various features and components of the units actually manufactured by Heatransfer could be utilized, with some design changes, in additional units that Heatransfer never produced. It does not appear that the manufacturing facilities would have to have been modified to any significant degree in order to accommodate different unit types. Nor does it appear that the plaintiff would have had to obtain new contract rights or additional sources of financing in order to expand.

Thus, the history of the expansion and growth patterns of other competitors in the relevant market, the fact that production facilities did not have to be varied significantly, and the fact that customers for one unit would in all likelihood remain customers for other units lead this Court to the conclusion that the addition of other product lines must be considered as growth of a company for purposes of damages rather than expansion into new areas for purposes of determining standing. In this regard, the proper standard for considering if the jury award for lost sales of these units is supported by the evidence is whether or not such an award is based upon more than mere speculation and guesswork and not whether plaintiff has carried the more difficult burden in proving standing of showing that plaintiff had the preparedness and intent to expand in these areas.

IX. CONCLUSION

The issues presented in this case were complex, involving several sections of the antitrust laws. We have attempted to address ourselves to every issue raised by the litigants without being unnecessarily prolix, bearing in mind the role of an appellate court. We have dealt with some arguments only briefly, and have not discussed some others raised. This was not done through oversight, but was rather the result of our attempt at a careful selection of issue meriting discussion. We are confident that we have fairly responded to the arguments presented by the litigants.[21]

The judgment appealed from is AFFIRMED.

The Court does not find for the above stated reasons that the assumption that Heatransfer would have expanded is based upon speculation or guesswork. Furthermore, the Court does not find that the application of the Heatransfer markup for its Type I units to the VPC prices for these additional units in determining lost profits and maufacturing costs makes the award speculative. There is evidence to the effect that this markup would have been higher if the plaintiff had based its calculation upon anything other than its Type I markup. Although the profits for these additional units cannot be assessed with complete accuracy, the use of the Type I profit margin in assessing lost profits resulted in a reasonable award under the circumstances of this case.

1975-1 Trade Cas. ¶ 60,309, (S.D.Tex. 1975), 66,222-66,225.

[21] Three issues, which we have not addressed in the body of this opinion, and which both litigants relegated to footnotes, are discussed below:

We find no substance to appellants' argument for a twelve person jury. This was clearly a civil case, with only civil penalties attached. Therefore, as held by the Supreme Court in *Colgrove v. Battin*, 413 U.S. 149, 160, 93 S.Ct. 2448, 2454, 37 L.Ed.2d 522, 531 (1973), "a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases."

Appellants further argued that the trial court erred in refusing to disallow plaintiff's claim for damages based on Section 7 of the Clayton Act since, appellants claim, a private plaintiff cannot base a damage action on a violation of Section 7. There is much dispute on

this issue, see. e.g., *Gottesman v. General Motors Corp.*, 221 F.Supp. 488 (S.D.N.Y. 1963), cert. den. 379 U.S. 882, 85 S.Ct. 144, 13 L.Ed.2d 88, but in *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 488 (5th Cir. 1967), this Court held: "We see no escape from the logic that § 7 of the Clayton Act is an antitrust statute within the scope and meaning of § 4 of the Act and so hold." We think this holding is dispositive of appellants' appeal on this issue.

Finally, appellants argue that the trial court erred in refusing to inform the jury that any damages awarded would be trebled, pursuant to Section 4 of the Clayton Act, 15 U.S. Code, Section 15. We need only quote a prior holding of this Court to dispose of this issue:

> ". . . we hold that the jury should not be advised of the mandatory tripling provision of 15 U.S.C.A. § 15. The primary policy supporting our decision is that underpinning the tripling provision itself. The purpose of treble damage is to deter violations and encourage private enforcement of the anti-trust laws. The justifiable fear of anti-trust plaintiffs is that the juries will adjust the damage award downward or find no liability, therefore thwarting Congress's purpose, because of some notions of a windfall to the plaintiff. One court has even suggested that a jury might take the revelation of the treble damage provision as an intimation from the court to restrict the amount of damages. In sum, we agree with the Court of Appeals for the Tenth Circuit that informing a jury would serve no useful function and its probable consequence would be harmful—an impermissible lowering of the amount of damages.
>
> "Second, it is not for the jury to determine the amount of a *judgment*. Its function is to compute the amount of *damages*. Congress's authorization in 15 U.S.C.A. § 15 to triple the award of damages is a matter of law to be applied by the district court without interference from the jury. The fact that the awarded amount will be tripled has no relevance in determining the amount a plaintiff was injured by the anti-trust violation." (Footnotes omitted).

Pollock & Riley, Inc. v. Pearl Brewing Company, 498 F.2d 1240, 1242-1243 (5th Cir. 1974), cert. denied sub nom., 420 U.S. 992, 95 S.Ct. 1427, 43 L.Ed.2d 673. See *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659, 667 (5th Cir. 1974), cert. denied, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-2779

D. C. Docket No. CA-72-H-1429
June 13, 1977

—o—

HEATRANSFER CORPORATION,

Plaintiff-Appellee,

versus

VOLKSWAGENWERK, A.G., *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

—o—

Before:

GOLDBERG, SIMPSON AND FAY, *Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 13, 1977

Issued as Mandate:

Letter

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Office of the Clerk

October 19, 1977

To All Parties Listed Below:

No. 75-2779—HEATRANSFER CORP. v. VOLKSWAGENWERK

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
By BRENDA M. HAUCK
Deputy Clerk

** on behalf of appellant, Volkswagenwerk,

cc: Mr. Charles Newton
Mr. Cicero C. Sessions
Mr. Herbert Rubin
Mr. Richard A. Posner
Messrs. John L. Jeffers, Jr.
Ralph S. Carrigan
Alan Gover

Notice of Denial of Rehearing en Banc

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

GROUP 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

• • •

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
• • •			
Heatransfer Corp. v. Volkswagenwerk	75-2779	10/19/77	S.D.Tex., 553 F.2d 964

• • •

Opinion of the District Court Denying Motion for a Directed Verdict at the Close of Plaintiff's Case ("District Court Opinion I").

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

C. A. No. 72-H-1429

September 30, 1974

—o—

HEATRANSFER CORPORATION

vs.

VOLKSWAGENWERK A. G., VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN PRODUCTS CORPORATION, AND VOLKSWAGEN SOUTH CENTRAL DISTRIBUTOR, INC.

—o—

• • •

CARL O. BUE, JR., *District Judge:*

The Court's ruling is as follows:

Pursuant to defendants' motion for a directed verdict at the close of plaintiff's case, the Court has carefully considered arguments and memoranda submitted by both sides, in an effort to determine if there is substantial evidence to support the plaintiff's case being submitted to the jury.

On motions for directed verdict the Court should consider all of the evidence, not just that evidence which sup-

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ports the non-movers' case, but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper.

On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fairminded men, in the exercise of impartial judgment, might reach difficult conclusions, the motion should be denied and the case submitted to the jury.

A mere scintilla of evidence is insufficient to present a question to the jury.

From an overall consideration of the evidence in this case it's apparent that the Heatransfer product was efficient and well designed and that it overcame several deficiencies that had plagued other units. It was easily installed, placed in such a manner so as to avoid damage to it from road hazards, provided good air circulation and could be installed as easily in right-hand drive vehicles as in left-hand drive vehicles. The unit was met with enthusiasm by Volkswagen dealers, as well as several Volkswagen distributors and executives.

Against this general description of plaintiff's product it's necessary to consider individually each violation alleged by the plaintiff to determine if there is substantial evidence to support a jury finding in favor of the plaintiff.

Citing that portion of the Volkswagen franchise agreement requiring Volkswagen dealers to promote equally Volkswagen products, plaintiff alleges that Volkswagen has promulgated a tie-in arrangement in violation of Section 1 of the Sherman Act, and Section 3 of the Clayton Act.

This, coupled with evidence that Gunther Kittel, Vice President of Volkswagen of America, pressured non-complying distributors into handling the VPC product and considered them in violation of the agreement if they failed to promote the VPC product, is at least sufficient evidence of an anti-trust violation to permit the threshold question of a per se violation to be sent to the jury.

It cannot be disputed that VWoA had sufficient economic power in the tie-in product, Volkswagen automobiles, to required that Volkswagen dealers also purchase its approved parts. Furthermore, there is sufficient evidence to demonstrate that the size of the Volkswagen air conditioning market is more than diminumus.

Although defendants argue that the requirement in the franchise agreement that Volkswagen products be given equal promotion is not an anti-trust violation because it does not require that only Volkswagen products be handled, the Court believes that there is substantial evidence upon which a jury could find that such a requirement is the practicable effect of excluding all other competitors.

Testimony in this trial has demonstrated the difficulties that an individual dealer would encounter in handling more than one line of air conditioning units, in that such practice would require dual training of service personnel and installing the units, as well as requiring double inventory.

Furthermore, there is substantial evidence, as demonstrated by VPC sales reports and correspondence and memoranda from Gunther Kittel, Vice President of VWoA, upon which a jury could find that Volkswagen dealers and distributors were in fact strongly urged to carry only one air conditioning unit in spite of the fact that the franchise agreement permitted other units to be carried.

A tie-in agreement may be evidenced by a course of conduct and need not necessarily be embodied in a written contract. The Court is well aware, of course, that defendants may be able to demonstrate that the franchise requirements were for quality control, or that the acceptance of VPC air conditioning was due to the salesmanship of the VPC air conditioners, rather than as a result of any coercive conduct; however, with regard to the plaintiff's allegations of an illegal tie, the Court finds, for the purposes of this motion, that there is substantial evidence upon which a jury could find that the defendants violated Section 1 of the Sherman Act, as well as Section 3 of the Clayton Act.

The complaint also alleges that the defendants, in further violation of Section 1 of the Sherman Act, have conspired to restrain trade through the use of port installation facilities and through the Volkswagen approval of the Delanair unit. The plaintiff has presented substantial evidence demonstrating that certain distributors around the country opened central installation centers in which air conditioners produced by VPC were installed in new cars before delivery to the dealer. Additionally, plaintiff has demonstrated that although many dealers preferred port installations, only VPC units were installed at these facilities, in spite of the fact that the distributor might also carry units other than those of VPC.

Evidence has also been presented indicating that the port installation facility operated independently by DPD Manufacturing Company was not economically feasible. When coupled with evidence that Helmut Weber and Gunther Kittel viewed the port installation facilities as a method for marketing the VPC product, as well as evidence that dealers often received cars with air conditioners already installed when air conditionnig of the cars had not

been ordered by the dealer, it appears, for purposes of this motion, that a jury could find that VWoA combined with independent distributors around the country, as well as VPC, to foreclose the plaintiff from the market.

Plaintiff has also presented substantial evidence that some Volkswagen dealers and distributors would not be inclined to carry the Heatransfer product because it did not have Volkswagen approval. Furthermore, many distributors rather summarily discontinued sale of the DPD Type 3 unit when VWoA approved the Delanair Type 3 unit. Although a jury may find that these instances constituted entirely proper individual refusals to deal, that do not violate the anti-trust laws, a jury might also reasonably infer that an agreement existed between VWoA and individual distributors and dealers to exclude non-approved products.

Accordingly, the Court finds that there is substantial evidence to permit a jury to decide, if the circumstances of port installation and refusals to deal without VWoA approval constitute a combination to restrain trade.

In addition to violations of Section 1 of the Sherman Act, plaintiff has alleged the use of the port installation facilities and VWoA approval also constituted conspiracy and attempt to monopolize in violation of Section 2 of the Sherman Act. Defendants argue that there is insufficient evidence to support a verdict in favor of the plaintiff under this section, because plaintiff has failed to demonstrate that defendants had monopoly power.

Plaintiff has offered substantial statistical data to demonstrate that VPC has, at times, controlled in excess of 80 per cent of the relevant market, which plaintiff defines as air conditioners for Volkswagen vehicles. Testimony has demonstrated that Volkswagen vehicles have unique en-

gineering features, such as an air-cooled engine, as well as an engine placed in the rear of the vehicle, which would tend to set Volkswagen air conditioners apart from those for more conventional automobiles.

Plaintiff has offered evidence demonstrating that, unlike most other makes of automobiles, there exists no aftermarket for air conditioners for Volkswagen vehicles. Furthermore, there is evidence to the effect that those companies manufacturing the Volkswagen air conditioners handle air conditioners for that type of vehicle exclusively. While this Court makes no finding, in ruling upon this motion, as to what the relevant market as in this case, a review of all of the evidence reveals that there is substantial evidence for the issue to be submitted to the jury for resolution.

Given the possible existence of monopoly power, the Court's decision regarding the existence of substantial evidence for violations of Section 1 of the Sherman Act through the use of port installation facilities, as well as VWoA approval, is applicable here. In the absence of any business justification for refusals to deal, a jury could find from the conduct of the dealers and distributors the existence of the specific intent necessary to find an attempt or a conspiracy to monopolize.

The Court also believes that there is such evidence to enable the jury to find the defendants illegally acquired Delanair as well as several independent regional distributors, in violation of Section 1 of the Sherman Act as well as Section 7 of the Clayton Act. Excepting for purposes of this motion, plaintiff's relevant market definition, as one encompassing only air conditioners for Volkswagen vehicles, it appears that the two major outlets for the sale of Volkswagen air conditioners were through VWoA and

through the distribution efforts of the various regional distributors, even though these two entities may have operated at different competitive levels. Within this relevant market, as defined by plaintiff, it's apparent that VWoA has engaged in a pattern of acquiring independent regional distributors, while at the same time, acquiring one of the competing manufacturers. From William Lende's testimony a jury could find that the number of outlets for Volkswagen air conditioners was rapidly being concentrated within the Volkswagen organization.

It's undisputed that the acquisition of VPC foreclosed to all Delanair competitors the opportunity of receiving VWoA approval. This is significant in view of the evidence demonstrating the high regard held by VWoA executives for the Heatransfer unit. Likewise, testimony relating to the change in the attitude of distributor Dick Conine, once his distributorship was acquired by VWoA, would support a jury finding that sales at the distributorship level were effectively foreclosed by the VWoA acquisition.

Accordingly, the Court finds that evidence of record would support a jury finding that foreclosure of these two outlets would operate as a clog upon competition in the relevant market urged in this case by the plaintiff. A defense of a failing business, urged by the defendants, presents a fact issue for the jury and is of no moment in the resolution of this motion.

Apart from substantive violations, defendants' motion is also premised upon their argument that plaintiff has failed to present substantial evidence that any act on the part of the defendants actually caused the decline of Heatransfer. Defendants would attribute the plaintiff's failure to its own lack of persistent sales efforts. Evidence of record demonstrates the sudden reversal in Delanair's declining sales at the time of the challenged acquisitions as

well as the dissatisfaction of many of Delanair's customers with its profit.

When coupled with evidence of the sudden reversal of Heatransfer's growing sales at the time of the challenged acquisition, and Lende's testimony that his experience demonstrated the futility of trying to sell on the dealer level without VWoA approval, a jury could reasonably find that VPC's market dominance was not due to superiority of its product, and that plaintiff's sales efforts would have been futile regardless of its course of action. Accordingly, the Court finds substantial evidence exists as to causation, thereby presenting a fact issue for jury determination.

Lastly, defendants challenge the sales and market calculations presented through the expert testimony of Dr. Robert Peterson on which were predicated plaintiff's actual damages through the testimony of Dr. Kermit Larson. In determining the plaintiff's lost sales, Dr. Peterson relied on four assumptions: One, that the plaintiff suffered damage. Two, that the damage period extended from November 1969 through December 1973. Three, that the period of unfettered competition used as a base in determining damages etxended from June 1969 through October 1969; and four, that Heatransfer could and would have produced and marketed air conditioning units for Types 2, 3 and 4 and Audi during the damage period. Although defendants allege that these assumptions were improperly made, the Court finds that evidence contained within the record, even though it may be seriously disputed, would support these assumptions on which the expert's opinion is based.

Aside from evidence relative to the business success of of the plaintiff during the two respective periods, upon which the jury could base its assumption, that is the base and damage period, there is also testimony to the effect

that Heatransfer had begun to design units for Types 2 and 3 vehicles to supplement the units it had previously produced for Type 1 vehicles as well as for the Porsche 914.

Accordingly, the Court does not find that assumptions regarding the base and damage period, or the later product development of other air conditioners by Heatransfer are so unsupported by evidence as to constitute speculation.

Defendants also challenge the manner in which plaintiff's expert witness used these assumptions in calculating plaintiff's lost sales. It must be recognized initially that once the fact of damage is proven the actual computation of damages may suffer from minor imperfections. Also, sometimes proof of losses, which border on the speculative, must be resorted to in order to implement the policy of the anti-trust laws.

Further, an economic expert is allowed some economic imagination as long as it does not become fancy. In this case the Court finds, for purposes of this motion, that a jury verdict for damages as determined by Method Two of Dr. Peterson's analysis would be supported by substantial evidence. Admittedly, this method of analysis is premised upon three additional assumptions challenged by the defendants:

One, that Delanair sales would have declined at a constant rate absent anti-competitive activity. Two, that the relative market shares of DPD, Heatransfer and Meier-Line would have remained constant. Three, that Heatransfer would have captured the same market shares for units manufactured for other types of Volkswagen vehicles.

In view of the difficulties experienced by Delanair in 1969, including loss of reputation as well as key personnel, the Court does not find the assumption that absent the interference of VWoA, Delanair would continue to decline

to be founded purely on speculation. Furthermore, the Court does not find that projection of future sales premised upon market shares established during the base period is necessarily erroneous. Plaintiff simply had no better source of information upon which to base its damage calculations.

It has been stated in the authorities that a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by a plaintiff is not entitled to complain but that they cannot be measured with the same exactness and precision as would otherwise be possible.

Without the Court passing upon the legality or illegality of defendants' conduct, since that is a jury function, it is obviously what this lawsuit is all about, and such standard of admissibility of evidence must be recognized and adhered to by a Court in anti-trust litigation.

However, with regard to Method One the Court is of the view that an estimation of damages based solely on a comparison of Heatransfer and Delanair, VPC sales during the base and damage period, may be unsupportable in view of the failure of plaintiff's expert to take into consideration the market shares of other competitors under such method. By this calculation the total Heatransfer-Delanair sales were determined for the base period with a division of these total sales being made between the two of them and no other. These percentages were then applied with the total Heatransfer-VPC sales in the damage period; lost sales for Heatransfer were then calculated by subtracting from Heatransfer's projected sales those sales that it actually made. By this method the experts assumed that the relative market shares for Heatransfer and Delanair would remain constant as if competition had been unfettered.

However, in using this method Dr. Peterson did not account for or consider other competitors in the market. In this respect the VPC sales, during the damage period, which were assumed to be distorted by the allegedly anti-competitive acts of the defendants, would have presumptively included the lost sales of Heatransfer as well as those of Meier-Line and DPD. Thus, a determination of Heatransfer's lost sales, premised upon the sales of VPC during the damage period without accounting for the lost sales of other competitors, may well provide the jury with a distorted and unsubstantiated view of plaintiff's damages.

The Court is aware that the jury, in its deliberations on damages, assume it chooses to award any at all, may well consider Method One or Method Two, or any combination of theories under the mass of evidence submitted on the subject up to this point.

Accordingly, at the conclusion of all of the evidence and at the time of preparation of the jury charge the Court will be amenable to giving an instruction to the jury to disregard calculations and conclusions premised upon Method One in the absence of other supporting proof forthcoming during the balance of the trial.

Accordingly, the defendants' motion for a directed verdict at the close of the plaintiff's case is denied.

Opinion of the District Court Denying Motion For a Directed Verdict at the Close of All the Evidence ("District Court Opinion II")

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 72-H-1429

October 23, 1974

HEATRANFER CORPORATION,

Plaintiff,

v.

VOLKSWAGENWERK A. G., *et. al.*,

Defendants.

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* * *

CARL O. BUE, JR., *District Judge:*

At the close of all evidence in this matter, defendants have moved for a directed verdict in their favor and principally rested their motion upon three arguments:

I. Plaintiff has failed to adequately demonstrate the amount of damages to which it is entitled;

II. Plaintiff has failed to differentiate its domestic and foreign sales, thereby precluding any recovery as application of Section 2 of the Sherman Act and Section 7 of the Clayton Act is limited to a nationwide geographic market; and

III. Plaintiff cannot recover damages under Section 7 of the Clayton Act.

I.

Defendants' arguments relative to proof as to the amount of damages sustained by the plaintiff have been thoroughly considered already by the Court in determining defendants' motion for a directed verdict at the close of the plaintiff's case. In view of the Court's prior decision and because defendants have failed to demonstrate any additional law or fact that would convince this Court that any jury determination of damages would be based upon mere speculation or guesswork, the defendants' motion for a directed verdict premised upon plaintiff's alleged failure to support the quantum of damages it alleges will be denied.

II.

Furthermore, the Court does not find that failure of the plaintiff to differentiate its domestic and foreign sales entitles the defendants to a directed verdict. On its face, Section 2 of the Sherman Act prohibits interference with "any part of the trade or commerce among the several States, or with foreign nations. . . ." Furthermore, it is well settled that "[a] consipiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1910). Nor are aliens immune from the censure of our antitrust laws when their activities without our boundaries

intentionally cause damage to our foreign trade. *See United States* v. *Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases ¶ 70,600 (S.D. N.Y. 1962). Thus, while it is true that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States," *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945), it is a proper function for this Court to consider those activities of the defendants that have a significant impact upon American imports or exports.

In this case, our primary concern is an American Corporation that has failed. Plaintiff attributes this failure to the activities of the defendants within and without our borders. Regardless of what the jury will determine to be the actual cause of this failure, there can be no question but that the injury has been sustained within the United States and that the export of the products manufactured by Heatransfer has been curtailed. Accordingly, while defendants may be correct in their argument that the relevant geographic market in this matter should be limited to the United States, it appears that the proper relevant product market should include consideration of exports as well as sales within the United States. In this regard, plaintiff's evidence of worldwide sales of products manufactured within the United States, as well as evidence of possibly anti-competitive acts ocurring in other countries that would affect the sale of these exported products, would be relevant in considering if that conduct resulted in restraint of trade with foreign countries, or a monopoly within the United States.

District Court Opinion II

III.

In view of the Fifth Circuit Court of Appeals decision in *Bailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967), holding that damages were recoverable for violations of Section 7 of the Clayton Act, defendants' motion with respect to damages for violations of Section 7 will be denied.

Because the other numerous arguments advanced in support of the motion have not been briefed or argued seriously at this time, any decision in favor of the defendants premised upon any of these grounds will be denied.

DONE at Houston, Texas, this 23rd day of October 1974.

CARL O. BUE, JR.
United States District Judge

Opinion of the District Court Denying Motion for a Judgment Notwithstanding the Verdict or for a New Trial ("District Court Opinion III")

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 72-H-1429

April 25, 1975

HEATRANSFER CORPORATION,
Plaintiff,

v.

VOLKSWAGENWERK A.G., *et al.*,
Defendants.

• • •

CARL O. BUE, JR., *District Judge:*

Before this Court for consideration are the defendants' Motion for Reconsideration of Order Denying Oral Argument and Alternative Motions for Judgment Notwithstanding the Verdict or For a New Trial. Defendants' motion for reconsideration is denied as the Court believes that the issues raised by the motions for judgment notwithstanding the verdict and for a new trial are set forth adequately in

the briefs filed by the parties to this matter. Accordingly, the Court has considered the motions for judgment notwithstanding the verdict and for a new trial and enters the following memorandum and opinion with respect to the legal issues that were raised and briefed by the defendants.

THE LENGTH OF JURY DELIBERATIONS

Defendants urge that this Court exercise its discretion and grant a new trial because the jury returned a verdict in favor of plaintiffs after deliberation lasting approximately one hour. Defendants contend that deliberations of this duration following an eight-week trial should shock the conscience of the Court and demonstrate that the jury reached conclusions with respect to their verdict prior to the presentation of all evidence, the arguments of counsel and the instructions of the Court. They attribute this result to a number of incidents that they allege caused prejudice to their case.

The Court does not find that the length of time that the jury deliberated is evidence, in and of itself, of any jury misconduct. Defendants have in no way demonstrated that the swiftness of the jury's verdict was attributable to anything other than the strength of each individual juror's convictions, arrived at after the presentation of all evidence, the arguments of counsel and the Court's charge. Furthermore, the Court finds unpersuasive the defendants' argument that various elements of the trial caused them prejudice.

First, the use of charts and expert witnesses in assessing damages is not in and of itself prejudicial to a defendant in an antitrust trial, and the Court does not believe that this

portion of the plaintiff's case contributed unfairly to the resulting verdict. Because of the defendants' arguments premised upon the legal sufficiency of plaintiff's proof of damages will be considered later, allegations with respect to the damage issue will be given no further consideration at this time.

Second, there is no evidence that the refusal of the Court to accord the defendants a twelve-man jury, as opposed to a six-man jury that is used in all civil cases within the Southern District of Texas, is responsible for any resulting "clubbiness and chumminess" that may have developed among the jurors during the course of the trial. Furthermore, any consideration of such an effect has been removed from this Court by the promulgation of Local Rule 25 requiring six jurors in civil cases. Upon a determination by this Court that the local rule is applicable, considerations such as those raised in this motion are irrelevant.

Third, the refusal of the Court to instruct the jury that damages in this case would be trebled is in accord with the law of this Circuit. *See Pollock & Riley, Inc.* v. *Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974). Accordingly, any consideration of prejudice resulting from a refusal to advise the jury of the trebling provision has been foreclosed to this Court by virtue of the *Pollock* holding.

Fourth, the Court does not find that the DPD-VWOA settlement agreement was used in any way to suggest that VWOA unfairly or illegally favored DPD. The agreement played no part in the Court's charge to the jury. Furthermore, the jury was never informed that the agreement was the result of a lawsuit filed against the defendants for substantially the same cause of action that forms the basis for the present action. Thus, the Court does not find that the

use of this agreement during trial to rebut inferences with respect to DPD's independent marketing success caused prejudice to the defendants. Furthermore, if any prejudice did result, it was clearly harmless error beyond a reasonable doubt.

Fifth, the Court finds totally unsubstantiated the defendants' allegation that the jury's verdict is the result of its bias and prejudice interjected by counsel for plaintiff against the nationality of the defendants, their employees or their witnesses. Indeed, any mention of the existence of such prejudice was that of counsel for the defendants. Accordingly, defendants' motion for a new trial premised upon the speed with which the jury deliberated is denied.

CONSTRUCTION OF THE VOLKSWAGEN DISTRIBUTOR AND DEALER AGREEMENT AS A QUESTION OF LAW

Defendants contend that it was error for the Court to submit to the jury Interrogatory I:

> Do you find from a preponderance of the evidence that the provisions of the Volkswagen dealer and distributor franchise agreements consitute tying arrangements under Section 1 of the Sherman Act?

This argument is premised upon defendants' assertion that the provision within the agreement constituting an illegal tying agreement is the "best efforts" provision:

> [Distributor or Dealer] will use its best efforts to promote the sale of VW Parts in its area through such means as may be specified from time to time by Directives and Suggestions.

Defendants support their contention with numerous cases that have held that "best efforts" provisions and requirements that a distributor handle a full line do not constitute illegal tying arrangements as a matter of law.

If this case involved only an interpretation of the "best efforts" clause, without more, the Court would agree with defendants that the issue should not have been submitted to the jury. Indeed, this is only too evident in the charge whereby the Court instructed the jury that "a manufacturer may require its distributor to promote to customers all its products so long as the purchase of one product of the manufacturer is not tied to the purchase of another of the manufacturer's products". However, in the instant case, the legal effect of a "best efforts" clause was not the issue before the jury. Rather, the existence of a tying arrangement by virtue of the franchise agreements and their enforcement, including the issue of the effect of the VW approval system and best efforts clause, involved issues of fact, including questions of whether or not the defendants had sufficient economic power in the tying product and whether the amount of trade foreclosed is more than insubstantial.

Although defendants argue that Interrogatory I submitted to the jury does not specifically mention conduct but refers only to the franchise agreement itself, the Court does not find that the jury's answer constitutes a decision on a question of law. In the charge, the Court specifically advised the jury that they were to consider the franchise agreement and its enforcement by VWOA officials in determining if a tying arrangement existed. The VW "best efforts" clause itself specifically refers to other "Directives and Suggestions". Furthermore, the Court advised the jury that it was not illegal for a manufacturer to require its

distributor to promote all of its products. Thus, the jury was sufficiently apprised by the charge that the defendants' conduct with regard to its franchisees was to play an integral part in their determination of whether or not a tying arrangement existed. Accordingly, the question of the existence of a tying arrangement by virtue of the operation of the franchise agreements was an issue of fact properly submitted to and determined by the jury. Defendants' motion for a new trial or judgment notwithstanding the verdict with respect to this issue will be denied.

THE RELEVANT MARKET

Defendants argue that the jury's determination of the relevant market is erroneous because of the ease of adaptability or substitutability among the various air conditioners manufactured for different automobiles. In support of their argument, defendants cite the Tenth Circuit's decision in *Telex Corp.* v. *International Business Machines Corp.* and the Ninth Circuit's decision in *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co., Inc.*

The Court does not find that the principles of law that form the basis of these decisions control resolution of the facts of this case. Interchangeability from a production standpoint was not the only issue to be considered by the jury. The jury was also asked to consider whether there existed a submarket with boundaries that would be determined by such "practical considerations as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized ven-

dors". *See Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962). *See also United States* v. *Grinnell Corp.,* 384 U.S. 563, 572 (1966). Thus, the fact that automobile air conditioners may be adaptable or interchangeable as argued by the defendants does not preclude the existence of a submarket founded upon the distinct customers and vendors within the Volkswagen organization, industry and public recognition of the Volkswagen family of automobiles, etc.

Because there is sufficient evidence to support the jury's market determination when all factors are considered, defendants' motion for a new trial or judgment notwithstanding the verdict will be denied insofar as the motion is premised upon considerations of the relevant market.

SUFFICIENCY OF EVIDENCE OF INJURY RESULTING FROM THE OPERATION OF THE FRANCHISE AGREEMENT

Defendants argue that the plaintiff has failed to introduce sufficient evidence that the franchise agreements caused it injury because these were operative both during the time span that plaintiff characterizes in its damage calculations as the period of "unfettered competition" and the "damage" period.

If the existence of a tie were premised solely upon the franchise agreement, there might be merit in defendants' arguments. However, as the Court specified in the charge, plaintiff's allegations of a tie were premised upon the franchise agreement as well as its enforcement by VWOA. In this regard, the nature and degree of enforcement is the variable upon which the plaintiff premises its allegations of injury.

There is sufficient evidence to support the jury's determination that the franchise agreement and its enforcement caused the plaintiff's injury. The record is replete with evidence that sales of the Delanair product increased dramatically after the purchase of that company by VWAG, even though the product itself had not been revised. When coupled with evidence of VPC and VWOA cooperation in marketing the product, as well as evidence of the pressure exerted upon distributors to purchase VPC units and open port installation facilities for the purpose of installing only VPC units, all of which commenced at the time of the Delanair purchase, a jury could logically infer that VWOA's interest in enforcing provisions of the franchise agreement to the exclusion of VPC's competitors coerced dealers and distributors into purchasing VPC units and caused the plaintiff's injury.

Although plaintiff has presented evidence of instances prior to 1969 in which pressure had been brought to bear upon Volkswagen dealers and distributors to purchase the Delanair product, this by no means insulates the defendants from liability for injury occurring as a result of later activities. Indeed, plaintiff may have suffered damages during the period characterized as "unfettered competition"; however, the fact that it has not sought relief or that this damage was not as severe as that it alleges it suffered during the "damage" period does not preclude recovery altogether. Thus, defendant's motion for judgment notwithstanding the verdict or for a new trial will be denied insofar as it is premised upon the operation of the franchise agreement.

THE VIABILITY OF METHOD II IN PROVING DAMAGES

Defendants challenge the method of calculating damages utilized in Method II for several reasons. Initially, defendants argue that Method II should be disregarded because it is premised upon a "market share analysis", as opposed to one of the two more conventional approaches known as the "before-and-after" method or the "yardstick" method. Although these latter methods are more widely accepted, *see Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F 2d 934, 954 (1975), they are not the exclusive methods in proving damages. *See, e.g., Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965). Defendants have failed to demonstrate that a market share analysis is inherently unreliable in proving damages. Accordingly, this Court will not hold that an antitrust plaintiff must be bound by convention in proving losses resulting from antitrust violations.

The Necessity of Expert Testimony

Defendants challenge the plaintiff's proof of damages, arguing that the plaintiff's use of Method II is improper because the analysis of lost sales is not premised upon the expert testimony of one familiar with the particular industry in which plaintiff operated. Rather, the calculations in the present case are premised upon the testimony of two expert witnesses who had no specialized knowledge of the industry and thus could not vouch for the accuracy of the assumptions underlying their calculations. From an over-

all view of the evidence, the Court has concluded that this argument is meritless.

This is not a case in which the plaintiff has never penetrated the market and requires expert evidence to demonstrate what its actual share of the market would have been, as was the case in *Terrell* v. *Household Goods Carriers' Bureau,* 494 F.2d 16 (5th Cir. 1974). Nor is it a case in which expert testimony was needed to prove similarities between the plaintiff's business and one that was similar but unfettered by an anti-competitive practice, as was the case in *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368 (9th Cir. 1957). Unlike the case of *Baush Machine Tool Co.* v. *Aluminum Co. of America,* 79 F.2d 217 (2d Cir. 1935), plaintiff's proof of damages did not involve an assumption contrary to the facts in evidence. Rather, plantiff's experts testified in an expert capacity only with respect to the accounting and economic theories supporting their calculations, the validity of the assumptions underlying these calculations was left to the jury's determination from the evidence presented at trial.

In the present case, the relative sales percentages of DPD, Meier Line and Heatransfer were derived from figures of actual sales during the base period. Furthermore, the sales figures for the base period demonstrate that Delanair sales declined 31 percent during that time frame. The assumptions upon which the expert's findings were based and, for which he could not vouch, were that this state of affairs would have remained at status quo during the damage period. Expert testimony was not necessary in order that a jury might make that assumption in assessing damage in view of the extensive evidence concerning the relative market that was presented to the jury during the course of the trial. Indeed, plaintiff asked the

jury to assume no more by virtue of this damage theory than is traditionally asked of a jury in any case in which damages are proved by reliance upon the more traditional "before-and-after" method of proving damages. *See, e.g., Ford Motor Company* v. *Webster's Auto Sales, Inc.,* 361 F.2d 874 (1st Cir. 1966).

In this regard, the jury heard evidence throughout the trial of the success of the various competitors within the relevant market during the base period and the damage period. They received information regarding the actual sales of air conditioning units of each competitor. They were apprised of the growing demand for automobile air conditioners and were informed about industry developments. Furthermore, the Court instructed the jury at the close of all evidence that

> [t]he opinions of experts based on hypothetical assumptions of fact do not tend to prove the assumed facts upon which the opinions are based. The actual facts must be found by the jury from the basic evidence itself and not from assumptions of fact adopted by expert witnesses in forming opinions or in preparing summaries, charts or other exhibits.

This advised the jury that they were free to find or reject the underlying assumptions. Accordingly, the Court does not find that the jury's verdict with respect to damages is based upon speculation or guesswork because the plaintiff failed to offer an expert witness who could vouch for an underlying assumption that the jury chose to accept. *See Vanderbilt* v. *Put and Call Dealer's Assoc.,* 344 F. Supp. 118, 142 n. 21 (S.D.N.Y. 1972).

THE SUFFICIENCY OF EVIDENCE TO SUPPORT THE UNDERLYING ASSUMPTIONS OF METHOD II

There is sufficient evidence in the record to sustain the jury's assumption that Delanair would have continued to decline until it disappeared as a viable competitor. The disrepute into which Delanair had fallen is adequately demonstrated by the sharp decline in its sales as well as by the testimony of the plaintiff and several Volkswagen dealers and distributors who were using the product in 1969. Furthermore, there is no evidence of any prospect of Delanair improving its product or removing the defects that had plagued it. Consequently, there is no evidence to support the defendants' argument that the jury's verdict disregarded legitimate competitive responses.

The assumption of a continuing decline does not necessarily conflict with the jury's determination that the "failing company" defense was unavailable to the defendants with respect to charges premised upon Section 7 of the Clayton Act. There is sufficient evidence within the record to support the jury determination that VPC failed to meet the high threshold requirements for a failing company defense. However, this evidence must be viewed in connection with the evidence indicating the failure of Delanair to make some progress toward improving the substantial defects in its product. Given this juxtaposition, there is nothing unreasonable or speculative in the jury's determination that, although Delanair could have been saved, it would not have been.

Defendants additionally argue that the assumption of a declining Delanair is erroneous because it assumes that Delanair, even though declining, would have developed and marketed other types of units that were not available during the base period. Furthermore, defendants point

out that sales of these other types of units were declining at a rate greater than 31 percent per year in order that the total of the Delanair-VPC sales would decline at a rate 31 percent per year. They argue that the additional rates are speculative with no basis in fact.

The Court does not find that the defendants have been injured by the assumption that Delanair would have developed and marketed other units while it was declining. Indeed, had the plaintiff not offered such an assumption, the logic of plaintiff's damage theory would have demanded that the sales of other units produced by Delanair-VPC be attributed to DPD, Meier Line and Heatransfer, thus increasing the amount of damages to which plaintiff alleges it is entitled. Furthermore, the fact that Method II is premised upon the assumption that the total sales of all Delanair-VPC units declined at a rate of 31 percent per year, rather than that the sale of each unit declined at that rate, does not indicate that the damage theory is premised upon speculation or guesswork. As stated above, the 31 percent per year rate of decline is based upon Delanair's actual sales during the base period. To apply this to Delanair-VPC's total sales during the damage period is not pure speculation, even though the questions of whether additional types of units would have existed and what their individual rate of decline would have been cannot be determined with precision.

Defendants attack the jury's assumption that Heatransfer's portion of the total sales relative to the other competitors would have remained constant during the damage period but for the unlawful activities of the defendants. They allege that such an assumption is speculative and contrary to the evidence because it fails to consider new

entrants into the market and because it fails to take into account the sales Heatransfer would have lost to DPD.

The assumption that Heatransfer's market share would remain constant is not contrary to the evidence. First, there is no evidence of any potential new entrants into the market. Second, although there is some evidence to the effect that the relationship between DPD and Heatransfer changed with regard to their respective market shares, there is also evidence that this was the result of the newer company's inability to establish itself because of the defendants' anti-competitive practices. Furthermore, during the course of the trial, the jury was presented evidence regarding methods of marketing, the merits and weaknesses of each individual competitor's product, the trends developing within the market, etc. It cannot be said that the inference that plaintiff's sales would have remained constant was made by the jury without a proper consideration of market conditions. Accordingly, the jury's determination to infer that the market shares of each competitor would remain constant cannot be said to be contrary to the evidence or to rest on speculation and guesswork.

Defendants also challenge the sufficiency of evidence to support the jury's assumption that plaintiff would have had the same success in marketing units for other models as it had in marketing its Type I unit. Although the evidence to support this assumption is not extensive, it is supported by the testimony of Bill Lende who testified that it was necessary to have a full line of air conditioners for the Volkswagen family in order to sell any one type of unit. Lende attributed this necessity to the fact that dealers generally preferred to purchase a full line of products from one manufacturer in order to assure the availability of spare parts and service. Based upon this testimony, it was reasonable for a jury to infer that a manufacturer's customer for Type I units would remain his customer in purchasing units for other vehicles.

The Court finds no merit in defendants' argument that the volume of unit sales during the damage period would be less than that actually achieved if VPC had not been a competitor within the relevant market. Although there is evidence demonstrating that VPC did develop new units and did organize an active sales force, it is also readily apparent from the record that other manufacturers were engaged in development of new units to the same extent of VPC. Indeed, DPD preceded VPC in some instances. Furthermore, there is no evidence to indicate that the tenacity of the VPC sales force was any greater than that attributable to other manufacturers. Accordingly, the inference that the size of the market would remain the same without the acquisition of Delanair by VWAG is reasonable and supported by sufficient evidence.

Lastly, defendants argue that damages cannot be awarded to the plaintiff for that period of time subsequent to Lende's decision to withdraw from competition with VPC. The fact that Lende voluntarily withdrew from the market is irrelevant in determining if plaintiff is entitled to recover damages. "The antitrust law does not require a plaintiff to retain possession of a business oppressed by antitrust violation until the business is bankrupted or directly shut down by the violator." *Pollock & Riley, Inc.* v. *Pearl Brewing Co.*, 498 F.2d 1240, 1244 (5th Cir. 1974); *accord Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 45 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972). The question of whether the plaintiff withdrew from the market because it was forced out by the actions of the defendant or whether it withdrew for other reasons was an issue of fact to be determined by the jury in responding to the interrogatory

relative to causation. Upon a finding that the defendants' conduct caused the plaintiff's injury, an award for damages subsequent to the plaintiff's withdrawal from the market is not erroneous.

ELEMENTS OF DAMAGES RECOVERABLE AS A MATTER OF LAW

Sales and Profits Allegedly Lost to DPD

Defendants argue that a certain percentage of plaintiff's damage calculations premised upon Method II is unrecoverable because it represents sales lost to DPD rather than VPC. The Court has carefully reviewed the defendants' calculations submitted in support of their argument and finds that they are inconsistent with the damage formula that forms the basis for Method II. Method II was premised upon total industry sales; however, defendants' calculations do not include sales made by VPC. Accordingly, the Court finds the defendants' argument to be devoid of merit.

Lost Capital Value

Defendants ask the Court to remit a portion of the damages awarded by the jury that may be attributable to lost capital value. This request is premised upon their argument that lost capital value should be calculated as of April, 1970, the date that Lende decided to concentrate on marketing the Heatransfer unit in the "aftermarket", rather than the date of trial.

Plaintiff is correct in assessing lost capital value as of the date of trial, rather than April, 1970. Lost capital value is to be determined at the date that a business ceases

to do business. *See e.g., Farmington Dowel Products Co.* v. *Forster Manufacturing Co.*, 421 F.2d 61 (1st Cir. 1969). In the instant case, plaintiff's decision in April, 1970, is no indication that plaintiff ceased doing business altogether. In this regard, the evidence demonstrated that Heatransfer continued to compete in the relevant market long after the April, 1970, date and even attempted to re-enter the market in 1973, only to find that the previous anti-competitive conditions continued to exist. Because Heatransfer continued to exist and, to some extent, compete until the time of trial, even though it was terminating its operations at that time, lost capital value was properly assessed as of the trial date.

Additionally, defendants challenge the inclusion in the claim for damages of $326,000.00 in interest on the capital value computation, arguing that prejudgment interest is not allowable as a matter of law. Plaintiff supports this award by arguing that the damage figure for interest does not represent prejudgment interest but is simply a vehicle for establishing capital value loss at the date of trial. In this regard, plaintiff, through its expert witness, demonstrated what its capital value loss would be as of December 31, 1973. Then, because figures for lost sales and profits were not available for the eight-month period of 1974 prior to trial, plaintiff's expert calculated lost capital value as of the date of trial by adding to the figure for December 31, 1973, an amount equal to a reasonable return on the capital loss value as of December 31, 1973, for the eight-month period of 1974.

In the light of this explanation, the Court does not find that the portion of the damage award labeled "interest" can be considered "prejudgment interest" that is prohibited as a matter of law. Further, although the Court does entertain some reservations with regard to the deter-

mination of capital loss value in this manner, it appears that remittitur of the sum labeled interest would result in no change in the judgment in view of the applicable rule in this Circuit that a court may not remit damages below what a jury might have awarded. *See, Jenkins* v. *Aquatic Contractors & Engineers,* 446 F.2d 520 (5th Cir. 1971); *Glazer* v. *Glazer,* 278 F. Supp. 476 (E.D. La. 1968). In this regard, the $5,000,000 verdict is less than the jury might have awarded, even if the interest figure were not included in the damage claim. Accordingly, remittitur premised upon the inclusion of interest on the capital value loss in the damage claim will be denied.

Profits from the Sale of "Other Model" Units

Defendants ask that the Court remit that portion of the damage award attributable to profits from the lost sales of units for "other models" because the plaintiff lacked the necessary "business or property" interest in the sale of units for vehicles other than Type I to permit the plaintiff to recover damages under § 4 of the Clayton Act. This request is based upon the argument that the plaintiff failed to demonstrate sufficiently that it had the preparedness and intention to engage in the manufacture of these additional units, a status that is necessary before an injured party who is about to engage in a business or to expand an existing business must prove before he has standing to claim that he has been injured.

In response, plaintiff admits that it never took affirmative steps in manufacturing these units. However, it argues that proof of preparedness and intention is relevant only to the threshold question of standing and that it has adequately demonstrated its standing through proof that

Heatransfer was a going concern engaged in the manufacture of air conditioners for Volkswagen automobiles. In this regard, plaintiff asserts that the question of whether it can recover for lost sales for types of units that it never manufactured is a question relative only to the damage portion of the trial and thus does not subject it to the heavier burden of proof for standing of preparedness and intention to enter a business.

It is undisputed that a plaintiff who has attempted to enter a market but who has not succeeded must demonstrate his preparedness and intention to enter that market before he may recover damages for an antitrust violation that foreclosed the market to him. *See, e.g., Martin* v. *Phillips Petroleum Co.,* 365 F.2d 629 (5th Cir. 1966). Furthermore, even though an antitrust plaintiff operates a going concern, he must demonstrate his preparedness and intent to expand that business into a new market if he claims that expansion of that business into a new market has been foreclosed to him by the monopolistic activities of the defendant. *See Zenith Radio Corp.* v. *Hazeltine Research,* 395 U.S. 100 (1969); *Volasco Products Co.* v. *Lloyd A. Fry Co.,* 308 F.2d 303 (6th Cir. 1962). However, the Court does not believe that a going concern, which is the victim of an anti-competitive practice, must forego damages for sales it would have made as the result of the natural expansion of its business simply because it was victimized early in its existence before its attempts to expand could ripen into evidence of preparedness and intent to increase its output. Thus, the question for the Court's determination is whether, under the facts of the present case, the manufacture of units for each type of Volkswagen vehicle in the relevant market can be considered the expansion of a present business into a new market for purposes of standing, or simply one facet of growth in an ongoing business for purposes of damages.

The line to be drawn between expansion into new areas and growth in established ones is not easily defined and one that must be determined from the facts of each case.

In the present case, the Court, after much consideration, finds that the sale of "other model" units should be considered as a damage issue. Plaintiff has sufficiently demonstrated that it had a business or property interest in a going concern that had the manufacturing capacity and the market for units for the entire Volkswagen family of automobiles. Testimony at the trial indicated that Volkswagen dealers expected an air conditioner manufacturer to develop a complete line and that these dealers preferred to deal with only one manufacturer who manufactured an entire line to satisfy their needs. It appears that the two major competitors in the market, DPD and VPC, developed additional units during the damage period, even though they manufactured during the base period just about the same variety of units as Heatransfer. Thus, the likelihood for growth and expansion of a business such as that of Heatransfer is evident.

Furthermore, there is evidence to indicate that the various features and components of the units actually manufactured by Heatransfer could be utilized, with some design changes, in additional units that Heatransfer never produced. It does not appear that the manufacturing facilities would have to have been modified to any significant degree in order to accommodate different unit types. Nor does it appear that the plaintiff would have had to obtain new contract rights or additional sources of financing in order to expand.

Thus, the history of the expansion and growth patterns of other competitors in the relevant market, the fact that production facilities did not have to be varied significantly,

and the fact that customers for one unit would in all likelihood remain customers for other units lead this Court to the conclusion that the addition of other product lines must be considered as growth of a company for purposes of damages rather than expansion into new areas for purposes of determining standing. In this regard, the proper standard for considering if the jury award for lost sales of these units is supported by the evidence is whether or not such an award is based upon more than mere speculation and guesswork and not whether plaintiff has carried the more difficult burden in proving standing of showing that plaintiff had the preparedness and intent to expand in these areas.

The Court does not find for the above stated reasons that the assumption that Heatransfer would have expanded is based upon speculation or guesswork. Furthermore, the Court does not find that the application of the Heatransfer markup for its Type I units to the VPC prices for these additional units in determining lost profits and manufacturing costs makes the award speculative. There is evidence to the effect that this markup would have been higher if the plaintiff had based its calculations upon anything other than its Type I markup. Although the profits for these additional units cannot be assessed with complete accuracy, the use of the Type I profit margin in assessing lost profits resulted in a reasonable award under the circumstances of this case.

District Court Opinion III

CONCLUSION

Defendants understandably have leveled every conceivable attack at the evidence, charge of the Court and jury verdict rendered in this case. The Court has endeavored to deal with each and every one of those objections which seemed to merit scrutiny and discussion. Any others raised and not discussed in detail have simply been viewed as wholly insubstantial and without merit and are summarily overruled. It is the considered opinion of this Court that, based on the law and the evidence and the credibility of the witnesses who testified, the jury verdict cannot be viewed as improper and that it should not be disturbed in any respect. Accordingly, defendants' post-judgment motions are denied.

Done at Houston, Texas, this 25th day of April, 1975.

Carl O. Bue, Jr.
United States District Judge

Appendix B

Section 1 of the Sherman Act, 15 U.S.C. § 1, in pertinent part provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal • • •.

Section 2 of the Sherman Act, 15 U.S.C. § 2, in pertinent part provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commence among the several States, or with foreign nations, shall be deemed guilty • • •.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The first paragraph of Section 7 of the Clayton Act, 15 U.S.C. § 18, provides:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part

of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-902

VOLKSWAGENWERK AKTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN PRODUCTS CORPORATION AND VOLKSWAGEN SOUTH CENTRAL DISTRIBUTOR, INC.,

Petitioners,

v.

HEATRANSFER CORPORATION,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Bowne of Houston, Inc. Printed in U.S.A.

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v.

HEATRANSFER CORPORATION,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS RESTATED

1. Whether the petition should be granted to review a jury's fact finding that provisions in the Volkswagen franchise agreements, as *interpreted and enforced,* resulted in *per se* tying violations.

2. Whether the petition should be granted to review a jury's fact findings that the sale of air-conditioners for the various automobiles manufactured by the Volkswagen, Porsche and Audi companies constitutes a relevant market

for purposes of Section 2 and Section 7 analysis when those findings were affirmed in light of all relevant market indicia set forth in *Brown Shoe Co.* v. *United States.*

3. Whether the petition should be granted to review jury findings of two Section 7 violations based on substantial evidence that the acquisitions in question brought about actual competitive foreclosure with resulting monopoly power.

4. Whether the petition should be granted to review an asserted failing company defense, rejected by the jury, when

(a) none of the elements of the defense was found by the court of appeals to be factually supported, and

(b) the court of appeals rejected petitioners' contention that respondent conceded the existence of such a defense.

5. Whether the petition should be granted to review the claim of conflict with this Court's opinion in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, when, as recognized by the court of appeals, the record is replete with evidence of actual lessening of competition — the missing element in *Brunswick.*

STATEMENT OF THE CASE

The evidence of record on which plaintiff based its case and to which the jury gave credence is well-summarized in the Opinion of the Court of Appeals. The "Statement of Facts" in the petition is correct insofar as it recites the length of trial, the nature of the jury's 15 special verdicts, and the amount of the judgment. Otherwise, it simply reflects an articulation of inferences contrary to those

drawn by the jury and omits critical facts on which the jury was entitled to rely.

A factual overview will serve to reveal how the relevant market came into being and why the antitrust violations occurred. By 1968 more than 500,000 new Volkswagen cars were being sold each year in this country, and in the year preceding trial, 1973, sales of new Volkswagen, Porsche and Audi cars continued at this volume. (DX 857, 862).[1] Throughout this period, millions of vehicles were manufactured and imported without factory air-conditioning because the Volkswagen, Porsche and Audi factories lacked technical capacity. This lack of technical capacity to air-condition cars successfully at the factories was acknowledged emphatically by the highest Volkswagen officials to testify at trial. (A. 3187, 3740). Thus, beginning in the mid-1960's, a clear business opportunity existed for independent manufacturers with the ability to design and sell air-conditioners suited to the design of the Volkswagen, Porsche and Audi cars. Companies came to life whose founders had ideas for the design and sale of these air-conditioners, recognizing a substantial profit opportunity in the endeavor. Respondent, Heatransfer Corporation, was such a company.

In this country, the distribution system into which air-conditioners would be sold consisted of Volkswagen of America, Inc. (VWOA, the exclusive importer for all three vehicle manufacturers), VWOA's independently franchised wholesalers and its independently franchised dealers. VWOA perceived an air-conditioning market developing around the sale of vehicles it imported and, *solely to avail itself of the profit opportunity in that market,* entered an annual contract whereby it purchased and resold to its

[1] "DX" and "PX" references are to defendants' and plaintiff's exhibits. "A" references are to the printed Appendix filed below.

franchisees the entire output of one of the independent manufacturers, Delanair. (A. 1874-75, 3636). The competing manufacturers proved to have superior products, however, and by 1969 VWOA saw its profit opportunity in the sale of air-conditioners slipping away. (A. 3668-69). Rather than permit the air-conditioning needs of its vehicles to be served by innovative competitors with superior products, VWOA acquired control of its previous supplier (Delanair). At the same time, VWOA acquired control of the largest independently franchised wholesaler of air-conditioners for the Volkswagen, Porsche and Audi cars (Intercontinental Motors Corp.). Market control was then secured by additional overt conduct of an anticompetitive nature. (*See* Opinion of Court of Appeals, Petition 23a-24a).[2] VWOA's new air-conditioning subsidiary, Volkswagen Products Corporation (VPC), gained monopoly power, and over the period 1971-73 generated $50 million in gross revenues with $7.5 million in net profits. (A.2239-40, 2592; PX 14, 19-20). Competitors were relegated to the dismal business life of bare subsistence, which is inevitable when a market becomes distorted by the anticompetitive and illegal conduct of a dominant company.

REASONS FOR DENYING THE PETITION

A. The judgment is supported by alternative and independent findings of liability; certain of these findings are not challenged in the petition.

The questions presented by the petition were restated at the outset of this response to reflect respondent's view that this case involves long-established legal principles with an abundance of factual support, rather than "erroneous and expansive rules of liability and damages." As the questions presented indicate, respondent went to trial on alternative theories of liability under Sections 1 and 2 of

[2] Further references to this opinion will simply cite to the petition appendix and page number.

the Sherman Act and Section 7 of the Clayton Act which independently support the judgment below.

In 13 special interrogatories, the jury found, and the courts below affirmed, liability under all statutory theories. (Petition 2a-5a, n.1). In Question 14, the jury was asked whether "such violation or violations" as it had found caused injury to the respondent's business. Petitioners did not object to this manner of submitting the causation issue and requested no alternative form of submission. The jury answered Question 14 in the affirmative and, in answer to Question 15, awarded damages. Thus, the result below has alternative and independent bases for support under Section 1, Section 2 and Section 7. While the court of appeals sustained all statutory bases of liability, it could have sustained the judgment by satisfying itself as to only one of them. The same holds true so far as review by this Court is concerned.

The existence of independently supportive legs for the judgment is especially significant since petitioners present no question for review related to the jury findings that defendants participated in a conspiracy which unreasonably restrained trade in violation of Section 1 (answers to Questions 3, 4 and 5). These conspiracy findings, as noted in the opinion of the court of appeals (Petition 24a), were based on a plethora of evidence showing coordination among the defendants to foreclose competition. The petition fails to address these findings which support the entire judgment.[3]

[3] Petitioners say they do not challenge the jury findings of conspiracy in restraint of trade because the court of appeals affirmed them on the basis of *per se* tying. (Petition 14, n.12). The court of appeals, however, recognized the overall evidence of conspiracy in restraint of trade, of which tying was but one possible

While respondent believes the judgment below can be sustained even if only one group of statutory liability findings is correct, there is no reason in fact, in law or in policy regarding the grant of certiorari to review any of the questions presented.

B. As to the tying offense, neither the legal principles nor the evidence presents an issue for review by this Court. (Response to Question 1 of the Petition).

Volkswagen, Porsche and Audi franchisees are required as a condition of the franchises by which they obtain the automobiles also to purchase and sell air-conditioners "approved" by VWOA, which in this case were the Delanair air-conditioners prior to the acquisition of Delanair and then the VPC air-conditioners. (PX 141, 142). While VWOA argued that its franchisees were "free agents" to purchase from competing suppliers, the evidence made it clear that this "free agency" was illusory. There was evidence that VWOA told all distributors and dealers in a policy statement of their obligation to sell VWOA's air-conditioners and in this same policy statement restricted their purchases of competitive units to situations where the dealer had a "corresponding volume of the genuine and approved item." (PX 22). In a later policy statement, all distributors and dealers were exhorted to carry the VWOA unit exclusively. (PX 638). One recalcitrant distributor was "persuaded" to join the program for the approved air-conditioners after a "short and to the point" conversation. (PX 100, 117). Another major distributor did so after having been put "under considerable pressure," which consisted of numerous concerted calls to the distributor

example, and in no way disturbed the findings. (Petition 24a, 45a). These findings of unreasonable restraint of trade remain. *See Fortner Enterprises Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 499-500 (1969) (tying is also subject to rule of reason analysis).

telling him that he had to order the VPC air-conditioner and bring his inventory to the "necessary level." (PX 264, A. 3717). As the ultimate enforcement tool, defendants began to put the approved air-conditioners on the vehicles at port facilities in advance of receiving orders from the dealers specifying whether they wanted cars with or without air-conditioners: "[Y]ou order a bunch of particular type cars over there and they say they all got air-conditioners on them.... And if we wanted cars we took them." (A. 2930) (*See generally* Petition 23a).

The trial court found sufficient evidence of the threshold criteria for tying (economic power over the tying product and a not insubstantial amount of commerce in the tied product) and sufficient evidence of actual tying to submit the question to a jury. The court of appeals sustained the finding, quoting the trial court's charge which clearly and correctly set forth all of the elements of a tying offense and as to which no complaint was made on appeal. (Petition 22a, n. 12).

Petitioners say that this case makes *per se* tying violations out of "best efforts" clauses which are contained in "almost all" franchise agreements and that the effect of such a holding will be devastating for the franchise industry.[4] The court of appeals explicitly said that it was not holding all "best efforts" clauses to be *per se* tying violations (Petition 23a) and explicitly rejected the argument that the jury finding, taken in light of the charge, was based

[4] There is no record evidence regarding provisions in franchise agreements other than those in franchises for Volkswagen, Porsche and Audi vehicles. Curiously, the cases cited in the petition (page 11, n. 8) for the "almost all" proposition were decided under the Automobile Dealer Franchise Act, 15 U.S.C. § 1221 *et seq.*, one of the principal purposes of which was to prevent automobile manufacturers from forcing unneeded or unwanted parts and accessories on dealers. *E.g.*, *Volkswagen Interamericana S.A. v. Rohlsen*, 360 F.2d 437, 442 (1st Cir.), *cert. denied*, 385 U.S. 919 (1966).

on the franchise provisions standing alone (Petition 20a). The trial court clearly explained the concept of tying two products together and instructed the jury that power over the tying product "must have been used to force the purchase of some unwanted product." (Petition 21a, n. 12). Thus, the jury was required to find not only tying arrangements but also enforcement of those arrangements in order to answer the interrogatory as it did.

Finally, petitioners assert that the court of appeals created a new evidentiary standard for competing suppliers with regard to tying. It is difficult to see how this can be said in light of the following operative language from the opinion (Petition 22a):

> If franchisees are coerced or 'persuaded' to buy goods which they otherwise would not buy, with the result being tremendous lessening of the market in which a competitor sells his product, such a showing is sufficient to submit the question of a Section 1 antitrust violation to the jury.[5]

C. Petitioners' relevant market argument assumes that Brown Shoe Co. v. United States and the relevant market criteria set forth therein do not exist. (Response to Question 2 of Petition).

The jury found for purposes of Section 2 and Section 7 the relevant market to consist of the sale of air-conditioners for Volkswagen, Porsche and Audi vehicles. The evidence showed that within the universe of automobile air-conditioning there were (1) domestic automobile manufacturers who design units specially for their cars and install them at the factories; (2) independent manufacturers, some of whom produce a fairly wide variety of units for more conventional cars with water-cooled engines

[5] With respect to the evidentiary requirement of "coercion" in tying cases, *see FTC* v. *Texaco, Inc.*, 393 U.S. 223, 230 (1968); *Ungar* v. *Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1221 n.7a (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

but most of whom have not continued to be successful (A. 1747-49, 2885-87); and (3) specialized vendors selling air-conditioners for the Volkswagen-Porsche-Audi line of cars. (A. 4409-22). The Volkswagen-Porsche-Audi air-conditioning business was shown by respondent to be distinct and separable from the other two categories because (a) the absence of factory installation and the large number of Volkswagen, Porsche and Audi cars being sold created a distinctly large potential air-conditioning business; (b) consequently, vendors able to design units successfully were attracted to the Volkswagen business on a specialized basis; (c) there was a substantial distributor-dealer network representing a distinct set of customers in that it had air-conditioning demand for the Volkswagen-Porsche-Audi line of cars and for no others; and (d) design characteristics of these cars required a distinctive design approach to air-conditioning which prevented non-specialized vendors from successfully developing units. (Petition 26a-27a). In addition, it was shown that in the judgment of VPC, air-conditioner sales were not sensitive to the prices of air-conditioners for other cars. Therefore, when requested by distributors to reduce prices on air-conditioners in order to make the overall car price more competitive with prices for other kinds of air-conditioned cars, VPC refused on the ground that a price reduction would not increase the volume of its air-conditioner sales. (A. 2806, 2481-89). Petitioners' contention that the relevant market consisted of the sale of air-conditioners for all cars or all small cars was a bald assertion which could have no weight in the face of concrete and extensive evidence supporting respondent's view of the market.

Brown Shoe Co. v. *United States*, 370 U.S. 294, 325 (1962), established that relevant market is to be determined by examining all factual indicia. Petitioners seek review

on the basis of one index — production flexibility —in isolation. Petitioners' narrow view is explained by the fact that, when all was said and done, their only evidence on relevant market related to the theoretical ability of a manufacturer to convert his facilities from the making of air-conditioners for one type of automobile to another. The trial court instructed the jury that they should consider production flexibility in making their relevant market determination. No court has held the existence of production flexibility to be dispositive as a matter of law. *See Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674, 691 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976).[6]

The cases cited by petitioners from the Supreme Court, Ninth and Tenth Circuits (Petition 15-16) as being in conflict with the relevant market determination in this case

[6] Moreover, such a ruling would be unfathomable in a case where the record proved that production flexibility never existed as a practical matter. The evidence in fact showed that numerous manufacturers of air-conditioners for other types of cars had tried unsuccessfully to design units for the Volkswagen line of cars that would work properly and could be sold, and that manufacturers successful in the design of units for the Volkswagen line of cars historically had specialized and did not attempt to move into other lines. Production flexibility was purely theoretical because in the automobile air-conditioning business there is absolutely no flexibility or interchangeability at the buyer level where a distributor or dealer who sells a particular line of cars has absolutely no demand for and cannot use air-conditioners designed and made to fit other types of cars.

It is well-established that analysis of the market from the buyer level is essential. *See e.g., United States* v. *Aluminum Co. of America*, 377 U.S. 271, 275 n. 3 (1964); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 551 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1, 11 (7th Cir. 1972); *Reynolds Metal Co.* v. *FTC*, 309 F.2d 223, 227 n. 5 (D.C. Cir. 1962); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 592 (S.D.N.Y. 1958).

are not in conflict.[7] Those cases involved apparent flexibility or interchangeability at the seller and buyer levels, whereas such interchangeability at the seller and buyer levels did not exist as a factual matter in this case.[8] More essentially, there is obviously no conflict in legal principle between those cases and this case. Relevant market has been universally recognized as being a question of fact heavily dependent on the characteristics of the particular industry involved. *See Sulmeyer* v. *Coca-Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

Petitioners also argue that even assuming the correctness of market definition, the finding of monopoly power was improper because of the existence of interbrand competition in the sale of automobiles. The jury was instructed that monopoly power was the power to control prices and exclude competitors, which could be inferred to some extent from market share. In addition to a market share of approximately 75%, VPC was demonstrated to have the ability to exclude competition and to control price over the sale of air-conditioners for Volkswagen, Porsche and Audi cars. Petitioners argued for and received instructions to suggest that the relevant market might be the sale of air-conditioners for all cars or all small cars but never requested an instruction that the jury consider interbrand

[7] In asserting that the decision in this case is in conflict with decisions of the Ninth Circuit, petitioners neglect to note that in *Calnetics Corp.* v. *Volkswagen of America, Inc.*, *supra*, that court, in a case involving Volkswagen air-conditioners, cited with approval the district court's treatment of production flexibility in this case. 532 F.2d at 691 n.29.

[8] Thus, the alleged "conflict" with the Tenth Circuit is not a difference in law. Production flexibility was a factual reality in the case before that court and was not here. *Compare Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 912 n. 11 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) *with* Petition 26a-28a.

competition in the sale of vehicles in determining the existence of monopoly power. (A. 552-54). In any event, the argument is a complete *non sequitur* unless the concept of monopoly power is to be limited to only a few basic industries.[9] It would make as much sense for petitioners to say that competition in the sale of automobiles negates the possibility of monopoly power in the sale of tires by independent manufacturers or that competition in the production of crude oil negates the possibility of monopoly power in the sale of oil field equipment to producers. The cases cited in the petition pertaining to the relationship between interbrand and intrabrand competition involved the same product market and have no application to a case where different product markets — air-conditioners and automobiles — are involved.

D. The Section 7 findings were supported by substantial evidence of competitive foreclosure, and there was a complete absence of evidence to support the failing company defense. (Response to Questions 3, 4(a) and 4(b) of the Petition).

The wording of the questions presented suggests petitioners' belief that the corporate acquisitions in issue could not have been unlawful because they involved a "captive supplier" on the one hand and a "wholesale distributor" on the other. Since all corporate acquisitions which substantially lessen competition in a relevant market in the United States are subject to the proscription of the statute, these generic descriptions are meaningless. The court of appeals held that the evidence taken as a whole was sufficient to sustain the findings of a substantial foreclosure of competition in violation of Section 7. (Petition 29a-31a).

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[9] *See Associated Press* v. *United States*, 326 U.S. 1, 17 (1945); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 425-26 (2d Cir. 1945).

The evidence showed that these contemporaneous acquisitions enabled the application of economic force on the distribution system by VWOA, causing the trend in market shares substantially favoring competitors of Delanair immediately prior to the acquisitions to be reversed immediately thereafter. (Petition 31a). Petitioners' claim at trial and here of improved market share because of improved product is futile; the evidence showed that the reversal in market share trend was accomplished before VPC made any product improvement. Delanair units which had been virtually unsaleable prior to the acquisition (called "rubbish" by one Delanair executive) suddenly became eminently saleable in the hands of VWOA's new subsidiary VPC. (PX 7-8, A. 3262-67, 3517-18). The reversal in market share trend was perpetuated from 1969 through 1973 with VPC gaining monopoly power and the competitors substantially foreclosed.[10]

In light of the relevant market findings, the market share evidence before and after the acquisitions, and the methods underlying the reversal in market share trend (which had nothing to do with product or management improvement),

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[10] Some of the market share data is set forth in the petition at page 7. There was additional evidence showing VPC with even higher shares. (PX 9-10; A. 2233-38, 2241-42). Petitioners suggest that the fact that VPC never attained the highest market share held by Delanair is evidence that the acquisition did not injure competition. (Petition 19, n.20). However, petitioners ignore the prime reason why DPD, one of the competitors, was able to arrest its decline. In 1971, DPD filed an antitrust suit against VWOA, concluded by a settlement agreement dated November 24, 1971 (referred to at trial as an "agreement"). In that agreement, VWOA agreed, *inter alia*, to guarantee the sale of 3,600 DPD units in 1972, to insert DPD catalog sheets in the VWOA catalog, to give DPD advance technical information, and to use its best efforts to have all VW distributors amend their order forms so that dealers could order DPD units through distributors. (PX 391). The import of this evidence was that VWOA reluctantly agreed to share the market it had foreclosed by its acquisition of Delanair.

the conclusion that these acquisitions substantially lessened competition was inescapable. In line with *Ford Motor Co.* v. *United States,* 405 U.S. 562 (1972), these vertical acquisitions restricted the customer market for independent suppliers by eliminating VWOA and the wholesale distributor as major potential customers for anyone other than VPC, and by giving VPC distinct advantage with respect to the other distributors and dealers. Despite petitioners' contention that VWOA was foreclosed to other competitors even prior to the acquisition, a VWOA executive admitted in his testimony that Delanair's continued poor performance would have required VWOA to turn to other suppliers absent the acquisition. (A. 3764).

Petitioners' contention that this case conflicts with *United States* v. *General Dynamics Corp.,* 415 U.S. 486 (1974), is based on a misconception of the two cases. In *General Dynamics,* it was held that a horizontal merger should not be judged solely on the basis of pre-acquisition market shares, but rather on the probable future effects on competition where the acquired company's limited reserves suggested it would be a declining factor. In this vertical merger case, post-acquisition market data compared with pre-acquisition data demonstrated that the foreclosure of competitors by reason of the acquisitions was not only possible but in fact occurred. Further, in a horizontal merger, the principal concern is that the combined strength of the merger partners will produce anticompetitive effects. When the acquired firm is weaker than its market share indicates, the probability of this effect is lessened. On the other hand, the lessening of competition in a vertical merger occurs because competitors at the supplier level are foreclosed from a customer market for their products. The pre-acquisition strength of the acquired supplier is irrelevant where, after the acquisition, the acquiring customer forecloses other suppliers and uses its economic

power to force the acquired supplier's products on other customers.

At trial, defendants' principal thrust with regard to the Delanair acquisition as a Section 7 violation was the failing company defense. The trial court's charge on failing company was given in the language of this Court in *Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969). In sustaining the jury's rejection of this defense, the court of appeals found insufficient evidence to satisfy any element of the defense. (Petition 31a-32a). Not only was reorganization in bankruptcy never even considered by Delanair, but there was (a) "nothing in the record that supports the theory that Delanair would collapse but for the acquisition" and (b) no evidence of "affirmative effort to sell Delanair on the open market" to a purchaser less anticompetitive than VWOA. (Petition 32a).

Realizing that their evidence is woefully inadequate to justify this Court's review of a failing company defense, petitioners assert that plaintiff conceded Delanair to be a failing company at the time of acquisition. The court of appeals properly held that "appellee did not argue, nor did it prove, that Delanair was a failing company." (Petition 39a). Plaintiff offered no testimony on Delanair's lack of profitability at the point of acquisition or on its prospects for financial survival in the future; it had no witness with any knowledge of this subject. Respondent did offer in evidence a damage model which captured the various competitors' sales trends in volume of units prior to the acquisition and projected those trends into the damage period, 1969 through 1973. This damage model showed declining sales by Delanair over the period 1969-73 because that was the trend established prior to the impact of unlawful conduct. If this damage model had assumed Delanair to be out of existence, to have no sales, at the

time of acquisition, petitioners could perhaps argue the failing company defense to have been conceded and thus urge the question not reached by this Court in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484 n. 9 (1977). However, no such assumption was made in the damage model; rather, Delanair was assumed to have sales continuing throughout the damage period. In fact, the damage model assumed that in 1973, the last year of the damage period, Delanair would have sold 5,513 air-conditioning units, more than Heatransfer ever actually sold in one year.

Whatever the merits of the question not reached in *Brunswick,* that question cannot be resolved in this case where the non-existence of the acquired company at the point of acquisition was neither conceded nor hypothesized.

E. The decision in this case is in full accord with Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (Response to Question 4(c) of the Petition).

A question recurring over the years has been whether Section 7 of the Clayton Act could support a private damage recovery when that statute predicates liability on a probable future lessening of competition as a result of a merger, whereas a private damage recovery requires present actual damages. The answer in *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967) and in *Carlson Companies, Inc.* v. *Sperry & Hutchinson Co.*, 507 F.2d 959 (8th Cir. 1974) was that private damage recovery can be obtained under Section 7 where the plaintiff shows not only that an acquisition may lessen competition in the future but that it has in fact lessened competition and caused damages. Plaintiff's position in this case from its earliest trial briefs was that it would show a right to damages under Section 7, *inter alia,* by showing that the two acquisitions in question caused an impermissible lessening of

competition in the marketplace over the period 1969-73, and that Heatransfer was one of the direct victims of this anti-competitive impact on the market.

In *Brunswick,* the plaintiffs contended that the acquisition of certain bowling alleys was illegal because the acquirer *might* use its "deep pocket" to engage in predatory practices, although there was no evidence that this had in fact occurred. 429 U.S. at 481-82, 490. Liability was predicated on a probable lessening of competition. In order to show damages, the plaintiff assumed that the bowling alleys in question would have ceased to exist but for the acquisitions, the acquisitions thereby denying plaintiffs business they would have had if the competing alleys had gone out of existence. *Id.* at 488.

This Court held that while the plaintiffs' losses occurred "by reason of" the unlawful acquisitions, *i.e.*, would not have occurred had the unlawful acquisitions not been made, these losses did not occur "by reason of" that which made the acquisitions unlawful. In other words, the mere fact of an unlawful acquisition or "mere presence" of an illegal acquirer in the market is not sufficient in itself for damages; rather, it must be shown that the illegal acquirer caused an antitrust injury to the competitive system of the type the antitrust laws were designed to prohibit and that damages flowed therefrom. In several different ways, the Court said that ideally there must be shown an actual anti-competitive impact from the acquisition in the relevant market resulting in damages to the plaintiff. *Id.* at 488-89. A concluding footnote delineates the distinction between *Brunswick* and this case:

> This does not necessarily mean, as the Court of Appeals feared, 523 F.2d, at 272, that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short term effect of certain anti-

> competitive behavior — predatory below-cost pricing, for example — may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. *Of course, the case for relief will be strongest where competition has been diminished. See, e.g., Calnetics Corp.* v. *Volkswagen of America, Inc., 532 F.2d 674 (CA9 1976)* ....

Id. at 489 n.14 (emphasis added).

This citation to *Calnetics* (a related case in which another air-conditioning competitor made the same allegations as Heatransfer regarding the Delanair acquisition and in which the Ninth Circuit remanded on the ground that the plaintiff had been erroneously denied a jury trial on its Section 7 damage claims) puts to rest any contention that *Brunswick* and the present case are alike. As stated in the Opinion of the Court of Appeals, Heatransfer proved much more than the fact of an unlawful acquisition or the "mere presence" of an antitrust violator in the market. (Petition 36a-38a). It proved that the acquisition of Delanair and the other challenged acquisition had exactly the anticompetitive effects of vertical integration that such acquisitions might be predicted to have: foreclosure of competition and of competing suppliers like Heatransfer. *See, e.g., Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 323-24. It was shown that the monopolistic character of the market was made possible, *inter alia,* through conspiracies in restraint of trade and predatory practices following the acquisitions. In short, the proof of injury to competition lacking in *Brunswick* was presented in full force.

Petitioners' contention that the damage model in this case, because it assumes declining sales by Delanair, is inconsistent with the holding in *Brunswick* is fundamentally wrong. *Brunswick* dealt with the type of injury that must be shown under Section 4 of the Clayton Act, 15 U.S.C.

§ 15, and did not purport to overrule any of this Court's decisions dealing with the method of quantifying injury, once proved. *E.g., Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 263-66 (1946). This Court did not reject the damage proof because it was improper to quantify damages based on the acquired firms ceasing to exist (that was the question of a conceded failing company not reached by the Court). Instead, the proof was held infirm because the damages quantified were based on the mere fact of the acquisitions with no showing of "antitrust injury" resulting therefrom.

Brunswick's missing element, injury to competition, almost necessarily put the damage proof at odds with the purposes of the antitrust laws. The incongruous result was a damage model postulating reduced competition and increased concentration but for the acquisitions. Damages in the present case, on the other hand, were predicated on a showing that the alleged violations reduced competition, resulted in a monopoly, and foreclosed competitors from the market. The damage model projected what might have taken place if competition had not been diminished and competitors foreclosed on the basis of what had taken place prior to the full impact of the violations.[11]

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[11] Heatransfer quantified its injury of foreclosure by constructing a model projecting into the damage period the state of competition prior to unlawful impact. The damage model postulated was not a monopoly (as actually existed over the period 1969-73), but a market in which the shares of the participating competitors were consistent with the existence of competition. Heatransfer was projected to be not the leading seller but the second leading seller with approximately a 30% share. It was accorded a greater share and hence volume of sales than Delanair because the evidence showed that Heatransfer and the other competitors had beaten Delanair in fair competition and proved their products to be superior prior to being foreclosed. Yet Heatransfer was not accorded Delanair's monopoly. Delanair's sales were projected as declining in the damage model because that was Delanair's trend prior to the impact of unlawful conduct.

Heatransfer's damage model followed logically from its proof of injury to competition. After showing injury to competition from the unlawful acquisitions, Heatransfer postulated on the basis of pre-impact evidence that if the market had been competitive, it would have outperformed Delanair. There is nothing incongruous with the antitrust laws in this construction, and there is accordingly no flaw in the damage model under *Brunswick*.

CONCLUSION

This case was correctly decided on the facts and law in the lower courts. The questions presented by the petition, taken individually or as a whole, provide no basis for the exercise of this Court's powers of review, and the petition for a writ of certiorari should accordingly be denied.

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In attacking the method of quantification in this case, petitioners make the startling suggestion that the damage model should have "demonstrate[d] what its [Heatransfer's] sales would have been had the Heatransfer unit been bought and resold by Volkswagen." (Petition 24). Such a model would presumably have required an assumption that Heatransfer's market share during the damage period would have been the same as Delanair's, which at times exceeded 80%. (Petition 7). This assumption would have resulted in a greater damage figure than the damage model actually used, which assumed that Heatransfer's market share would never exceed 30%.

Petitioners' argument above shows the difficulty of constructing damages in any way other than respondent constructed them. Since it was completely foreclosed by unlawful conduct, Heatransfer could only project on the basis of its performance in a relatively competitive market prior to impact. Having been illegally frozen out of the market, Heatransfer was unwilling to assume, for example, that any of its losses were caused by alleged product improvements thereafter made by petitioners. The alleged product and service improvements were never put to the "acid test" of competition. Petitioners, however, made the argument that VPC sales increases were due solely to product and service improvements, unrelated to any unlawful conduct, and the jury was instructed to test the damage model against all the evidence. The jury could have accepted petitioners' "product improvements" argument in whole or in part but apparently did not. The damage model was reviewed extensively by the lower courts. (Petition 33a-45a).

CERTIFICATE OF SERVICE

This is to certify the service of the foregoing was made on January 19, 1978, by depositing three copies of same in the United States mails, First Class Postage Prepaid. addressed to: Richard A. Posner, 1222 East 56th Street, Chicago, Illinois 60637.

/s/ C. Brien Dillon

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-902

VOLKSWAGENWERK AKTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN PRODUCTS CORPORATION and VOLKSWAGEN SOUTH CENTRAL DISTRIBUTOR, INC.,

Petitioners,

v.

HEATRANSFER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

In an effort to divert the Court's attention from the importance—which is not denied—of the antitrust questions presented, the brief in opposition portrays this case as one where a jury found misuse by an automobile company of its economic power to coerce its franchisees, to the injury of small competing suppliers like respondent. In fact, there was no such jury finding. All the jury found was that as a result of enforcement of Volkswagen's "best efforts" clause in accordance with its terms, the marketing opportunities for competing air conditioning manufacturers were lessened; that by acquiring its own air conditioning supplier, Volkswagen had foreclosed itself as a customer; and

that it enjoyed a very large share of a "market" limited to air conditioners installed in its own automobiles. Had misconduct of the sort traditionally condemned under the antitrust laws been found by the jury, the court below would not have had to extend the *per se* doctrine. Nor would it have had to lay down new law declaring "foreclosure" and not "coercion" to be the test for an illegal tie-in where the plaintiff is a competing supplier rather than a franchisee.

The case in this Court does not turn on disputed issues of fact. Rather, we contend that the court of appeals applied clearly erroneous rules of law in upholding the judgment in respondent's favor. The brief in opposition does not negate these legal errors; and only one of its points, the first, and least substantial, is even addressed to the "cert-worthiness" of the issues presented.

Alternative Grounds. Respondent's argument that the judgment is supported by alternative unchallenged findings of liability is so frivolous that the court of appeals did not even mention it. The jury did not assess damages separately with regard to each of the violations that it found. Hence, if any of the findings of violation is set aside, the entire judgment must be reversed because there is no way of knowing how much of the total damage award the jury may have attributed to such violation.[1] *Sunkist* v. *Winckler*

[1] In any event, the findings are interrelated, not independent. The jury's finding that the best efforts clause constituted an illegal *per se* tie-in was the basis on which the Fifth Circuit sustained the findings of a Section 1 conspiracy to restrain trade and of Section 2 monopolization (Pet. 24a, 29a). The market share issue is common to both the Section 7 and Section 2 charges, and the Section 7 allegations were also put to the jury as elements of the Sections 1 and 2 charges. The damage (*Brunswick*) issue is common to all of the alleged violations since it challenges the only damage theory submitted to the jury.

& Smith Co., 370 U.S. 19 (1962); *Pitchford* v. *Pepi, Inc.*, 531 F.2d 92, 107 (3d Cir. 1976), *cert. denied*, 426 U.S. 935 (1976).

"Best Efforts" Tie-in Question. Respondent's entire argument as to whether a best efforts clause is an illegal *per se* tie-in is that the Volkswagen best efforts clause was enforced and that if it had not been enforced the Fifth Circuit would not have deemed it illegal *per se*. We agree. The question presented is whether an *enforced* best efforts clause is illegal *per se*. If, as respondent does not deny, a best efforts clause serves valid business purposes that make it subject to the Rule of Reason and preclude its being classified as an illegal *per se* tie-in, it cannot become illegal *per se* by being enforced, as the court below held.[2]

Relevant Market. Only in this Court does respondent question the existence of production interchangeability. It does so without record references (Br. in Opp. 10 n.6) and in the face of undisputed evidence, including its own trial assertions (Pet. 15 n.13), of production interchangeability. At trial respondent conceded, indeed asserted, production interchangeability as the basis for claiming lost profits on air conditioner models that it never manufactured or even designed (Pet. 82a-85a). It is too late for it to argue the contrary.

Respondent's main relevant market argument is that production flexibility is but one of several criteria established by *Brown Shoe Co.* v. *United States*, 370 U.S. 294

[2] With regard to the Fifth Circuit's novel and unprecedented tie-in standard where the plaintiff is a competing supplier, respondent simply denies that the Fifth Circuit has departed from the requirement of "coercion" (Br. in Opp. 8 n.3)—this in the face of that court's unequivocal statement that "the fact of coercion appears less important in this situation [where an independent supplier asserts harm] then the fact of foreclosure" (Pet 22a).

(1962). The *Brown Shoe* guidelines are not a laundry list; this Court has emphasized that they are not to be used mechanically or talismanically to create economically irrational "markets." *United States* v. *Continental Can Co.*, 378 U.S. 441, 449 (1964); see also, *ITT Corp.* v. *GTE Corp.*, 518 F.2d 913, 930 (9th Cir. 1975). That is why the Ninth and Tenth Circuits have held that, where production flexibility is demonstrated, the relevant market must be defined broadly enough to include all products capable of being produced by the same production facilities. These decisions, we submit, represent appropriate clarification of *Brown Shoe;* but if, two circuits have, contrary to the Fifth Circuit in this case, misapplied *Brown Shoe,* review of this issue is all the more warranted.

Monopoly Power. No reply is offered to our argument that this Court's decisions do not permit a conclusive presumption of monopoly power to be based on market share statistics.[3] With regard to the bearing of interbrand competition (another fact that respondent conceded below as part of its damage claim (Pet. 17 n.18)), respondent distorts our position. We do not contend that if the automobile industry is competitive, there can be no monopoly of tire production or that if the production of crude oil is competitive there can be no monopoly of the production of oil-field equipment. Of course a tire monopolist could sell tires at a monopoly price to the automobile industry; and so with the sale of oil-field equipment to the petroleum industry. But American Motors Company, a small and competitive producer of automobiles, could not, by acquiring a manufacturer of tires, obtain monopoly profits from the sale of

[3] In another context (see p. 5 *infra*), respondent attempts unsuccessfully to distinguish *General Dynamics* as inapplicable to vertical mergers. The other cases we rely on for this point—*Citizens & Southern* and *Marine Bancorporation*—are not cited or discussed in the brief in opposition.

tires to itself or its franchisees. So too with Volkswagen and air conditioners sold in the Volkswagen "market" (A. 1552-55; 4398-4424). To this contention respondent offers no reply.

The Acquisitions' Competitive Effects. Respondent offers not a word in defense of the Fifth Circuit's holding that the Inter-Continental acquisition violated Section 7 (see Pet. 21). Nor does it mention *Citizens & Southern,* which is square authority against holding that the acquisition of a captive supplier, a long-term *de facto* affiliate, such as Delanair, is anticompetitive.[4] As for *General Dynamics* (Pet. 19-20), the principle it enunciates —that market share statistics are not "conclusive indicators of anticompetitive effects" (415 U.S. at 498)—is applicable to any case, horizontal or vertical.

Failing Company. The question whether the jury could simultaneously accept respondent's damage assumptions and reject the "failing company" defense is not one of fact, but of law, *i.e.,* the meaning of "failing." Respondent argues that only if its damage model had "assumed Delanair to be out of existence, to have no sales, at the time of acquisition" would it have proved (against itself) the "failing company" defense (Br. in Opp. 15-16). This confuses a "failed" with a "failing" company. The test of a failing company is not nonexistence and no sales at the time of acquisition; it is "the grave probability of a business failure." *International Shoe Co.* v. *FTC,* 280 U.S. 291, 302 (1930). The key assumption of Heatransfer's damage ex-

[4] Pet. 23. Perhaps alluding to the principle of *Citizens & Southern,* the brief in opposition ascribes to a Volkswagen executive an admission "that Delanair's continued poor performance would have required Volkswagen to turn to other suppliers absent the acquisition" (Br. in Opp. 14). In fact, all the witness conceded was the "possibility" that this might have occurred (see A. 4560)—the same kind of "possibility" that *Citizens & Southern* held was insufficient to support a violation of Section 7. 422 U.S. at 122.

pert, the jury and the trial court of a 31 percent annual decline in Delanair's sales, which there was "no reversing" until Delanair "ceases to exist," establishes the grave probability of a business failure (Pet. 22 n.23).[5]

The Brunswick Issue. Respondent claims that the difference between *Brunswick* and this case is that in *Brunswick* there was no proof either of injury to competition or of predatory acts, and here there was such proof (Br. in Opp. 19, 17). This attempted distinction is incorrect. Injury to competition was proved in *Brunswick,* as it must be in every Section 7 case; and the Court referred explictly to the possibility that the plaintiffs might have based damages on Brunswick's predatory acts (Pet. 25). The problem in *Brunswick* was that the damages proved were not limited to the consequences of antitrust injury or predatory acts but included loss of anticipated sales because "competitors were continued in business." 429 U.S. at 484. The same is true here. Respondent made no attempt to quantify its damage attributable to foreclosure, tying, or other *antitrust* injury, but as in *Brunswick* sought damages on the basis that, but for the acquisition, the acquired company's sales

[5] To our contention that petitioners were denied the benefit of the "failing company" defense because the jury was erroneously instructed that the petitioners had to prove that the acquired company could not have been reorganized in bankruptcy, respondent answers only that the instruction was "given in the language of this Court in *Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969)." (Br. in Opp. 15.) We so stated in our petition. The issue we raised, and respondent leaves unanswered, is whether, in light of subsequent decisions, such an instruction—which is completely inconsistent with the purpose of the defense—is sound law.

would have continued to decline to the benefit of respondent.[6]

Respondent seeks to limit *Brunswick* to its specific facts —a merger found unlawful on the basis of the acquiring firm's "deep pocket" or "mere presence" in the market. To the contrary *Brunswick* is applicable whenever a plaintiff bases his substantive antitrust claim on one theory (foreclosure of Volkswagen as a potential customer of Heatransfer) and his damages on another, involving no antitrust injury (the resuscitation of a failing company).

[6] Respondent is incorrect (Br. in Opp. 20 n.11) in arguing that petitioners had to prove that all of Delanair's revival was due to lawful product and service improvements, such as moving the condenser or broadening the product line. Under *Brunswick,* the burden was on Heatransfer to show what portion of Delanair's gain (or Heatransfer's loss) was attributable to anticompetitive conduct as distinct from lawful product and service improvements, which are procompetitive. Respondent cannot be serious in suggesting that its failure to prove damages which would satisfy *Brunswick* spared petitioners from a damage judgment greater than $15 million.

We have no quarrel with the *Bigelow* decision (Br. in Opp. 19) which involved no inconsistency between the plaintiff's liability and damage theories.

Conclusion

The brief in opposition confirms the presence in this case of important antitrust issues that are fully ripe for review. The petition for certiorari should be granted.

Respectfully submitted,

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Dated: January 30, 1978